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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. ...453

TRUCK DRIVERS UNION LOCAL NO. 413, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, ET AL.,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the District of Columbia Circuit.

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Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the District of Columbia Circuit.

Petitioners, Truck Drivers Union Local No. 413, the Central States Drivers Council, Truck Drivers and Helpers Local Union No. 728, and the Southern Conference of Teamsters, all of which are labor organizations affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in the above entitled case entered on April 9, 1964.

OPINIONS BELOW.

The opinion of the Court of Appeals printed in Appendix "A", *infra*, pp. 19-36, is unreported. The findings of fact, conclusions of law, and order of the National Labor Relations Board, hereinafter referred to as "Board", and the intermediate report of the Trial Examiner in Case No. 17,662 below (*Patton Warehouse, Inc.*), printed in Appendix "B", *infra*, pp. 37-101, are reported at 140 NLRB 1474. The findings of fact, conclusions of law, and order of the Board and the intermediate report of the Trial Examiner in Case No. 17,663 below (*Brown Transport Corp.*), printed in Appendix "C", *infra*, pp. 102-140, are reported at 140 NLRB 1436. Cases 17,662 and 17,663 were consolidated below for argument and decision.*

JURISDICTION.

The judgment of the Court of Appeals, printed in Appendix "D", *infra*, pp. 141-142, was entered on April 9, 1964. On June 30, 1964, by order of Mr. Chief Justice Warren, the time within which to file a Petition for Writ of Certiorari was extended to September 6, 1964. This order is printed in Appendix "E", *infra*, p. 143. Jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1) and Section 10 (e) of the National Labor Relations Act.

QUESTIONS PRESENTED.

I.

Whether Section 8 (e) of the Labor Act makes unlawful a provision in a collective bargaining agreement which protects individual employees against discipline for individual determination not to handle "struck" goods.

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* For convenience, the records below in Case No. 17,662 (*Patton Warehouse, Inc.*) and Case No. 17,663 (*Brown Transport Corp.*) will be referred to as "J. A. *Patton*" and "J. A. *Brown*," respectively.

II.

Whether the National Labor Relations Board may imply, contrary to the express terms of a contract, an illegal object, ignoring the stipulations of record and the evidence demonstrating the same lawful objective which is specified in the contract.

III.

Whether Section 8 (e) of the Labor Act makes unlawful a provision in a collective bargaining agreement which protects individual employees against discipline for refusing to cross or work behind all picket lines without requiring the employee first to ascertain the legality of the picket line.

IV.

Whether Section 8 (e) of the Labor Act, applicable to trucking industry unions, while exempting unions representing employees in certain specified industries, establishes arbitrary and irrational classifications in violation of the Fifth Amendment to the United States Constitution.

STATUTE AND CONSTITUTIONAL AMENDMENT INVOLVED.

The statutory provision involved is Section 8 (e) of the Labor Management Relations Act of 1947, 61 Stat. 140, as amended, 73 Stat. 543, 29 U. S. C. 158 (e) (referred to herein as the "Act"). It is printed in Appendix "F", *infra*, p. 144. The constitutional amendment involved is the Fifth Amendment. It is printed in Appendix "G", *infra*, p. 145.

STATEMENT.

The Labor Board, upon proceedings under Section 10 of the Act,[1] voided "Protection of Rights" articles in the Central States and Southern Area collective bargaining contracts between Teamster Union affiliates and thousands of trucking employers in eighteen states. The articles were held to violate Section 8 (e) of the Act, which was added by the 1959 Landrum-Griffin amendments. That Section (Appendix "F," *infra*, p. 144), proscribes the entering into "any contract or agreement, express or implied, whereby . . . employer ceases or refrains or agrees to cease or refrain from handling . . . transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person . . ."

The Challenged "Protection of Rights" Article.

The "Protection of Rights" article provides:

"Article 9. Protection of Rights.

"Section 1. Picket Line.

It shall not be a violation of this Agreement and it shall not be cause for discharge or disciplinary action in the event an employee refuses to enter upon any property involved in a labor dispute or refuses to go through or work behind any picket line, including the picket line of Unions party to this Agreement and including picket lines at the Employer's place of business.

"Section 2. Struck Goods.

Recognizing that many individual employees covered by this contract may have personal convictions

[1] 140 NLRB 1436 (*Brown*); 140 NLRB 1474 (*Patton*).

against aiding the adversary of other workers, and recognizing the propriety of individual determination by an individual workman as to whether he shall perform work, labor or service which he deems contrary to his best interest, the parties recognize and agree that:

[(a)] [2] It shall not be a violation of this Agreement and it shall not be a cause for discharge or disciplinary action if any employee refuses to perform any service which, but for the existence of a controversy between a labor union and any other person (whether party to this Agreement or not) would be performed by the employees of such person.

[(b)] Likewise, it shall not be a violation of this Agreement and it shall not be a cause for discharge or disciplinary action if any employee refuses to handle any goods or equipment transported, interchanged, handled or used by any carrier or other person, whether a party to this Agreement or not, at any of whose terminals or places of business there is a controversy between such carrier, or person, or its employees on the one hand and a labor union on the other hand; and such rights may be exercised where such goods or equipment are being transported, handled or used by the originating, interchanging or succeeding carriers or persons, whether parties to this agreement or not.

[(c)] The Employer agrees that it will not cease or refrain from handling, using, transporting, or otherwise dealing in any of the products of any other employer or cease doing business with any other person, or fail in any obligation imposed by the Motor Carriers' Act or other applicable law, as a result of indi-

[2] For convenience, Section 2 is divided into subsections (a), (b) and (c), and referred to herein as Section 2 (a), 2 (b) and 2 (c) of the agreement respectively.

vidual employees exercising their rights under this Agreement or under law, but the Employer shall, notwithstanding any other provision in this Agreement, when necessary, handle, use, transport or otherwise deal in such products and continue doing such business by use of other employees (including management representatives), other carriers, or by any other method it deems appropriate or proper."

This article, as well as conventional provisions as to wages and conditions, was negotiated by area negotiating committees of Central States and Southern motor carriers and the Central and Southern Conferences of Teamsters in January, 1961, after the enactment of Section 8 (e) of the Act (J. A. *Brown* 331ff.; 362ff.).

Union demands in connection with the contracts to be effective on and after February 1, 1961, included increased wage and pension benefits, improved working conditions and an amended "Protection of Rights" Article, which, the unions asserted, was designed to protect those individual employees who did not desire to go through or work behind a picket line or otherwise aid the adversary of working men, while assuring that the contracting carriers would continue to do business with all other employers by other available means.

Previous Area Contracts had contained "Picket Line" and "Unfair Goods" provisions. These authorized the *union* to prohibit interlining with a struck employer.[3]

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[3] The pertinent provision in the expiring contract was (J. A. *Brown*, 329, 330):

"It shall not be a violation of this Agreement and it shall not be cause for discharge if any employee or employees refuse to go through the picket line of a Union or refuse to handle unfair goods. Nor shall the exercise of any rights permitted by law be a violation of this Agreement. *The Union* and/or its members, individually and collectively, *reserve the right to refuse to handle goods from or to any firm or truck which is engaged or involved in any controversy with this or*

The expiring contracts, made before Section 8 (e) was enacted, thus reserved the right *to the union* "to refuse to handle goods", and did not affirmatively permit the carrier to utilize other means to transport such goods. The result was that union refusal under the expiring contracts meant complete embargo. After passage of Section 8 (e), the union abandoned the "picket line" and "unfair goods" provisions in the expiring contracts and proposed in their place the "Protection of Rights" article substantially as finally agreed upon. This forbade the employer from disciplining the individual employee who, as a matter of *individual* choice, honored a picket line, refused to perform "struck work," or refused to handle goods originating from strike-bound premises; but specifically permitted the employer to move the freight by use of other employees, other carriers, or by any method the carrier deems appropriate. Moreover, the union proposal affirmatively required the carrier employer to continue doing business with struck employers.

In negotiation of the contract the carriers agreed that interlining of freight with struck employers or those being picketed was practicable by use of supervisors, other employees, other carriers, "piggy-back", etc. (J. A. *Brown*, 274-276.).

The Implementation of the Contract.

After the effective date of the contract, Teamster Local Unions in Columbus, Ohio, and Atlanta, Georgia, became involved in lawful primary labor disputes with employers Patton and Brown, respectively, and lawfully picketed each of them. During the Patton dispute all the contracting employers continued to do business with Patton (J. A. *Patton*, 226). During the Brown dispute, except in isolated

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any other Union; and reserve the right to refuse to accept freight from, or to make pickups from, or deliveries to establishments where picket lines, strikes, walkouts or lockouts exist. . . ." (emphasis added).

instances shown to be the result of carriers' unilateral action, Brown's freight continued to be transported by carriers which were party to the challenged contracts (J. A. *Brown*, 259, 290, 298-299, 316, 321-323, 404, 405).

The Decision of the Board.

The Board concluded that Section 8 (e) prohibited contractual protection against discharge or discipline for the employee who refuses to cross a picket line unless the protection was limited to refusals to cross (1) lawful primary picket lines at the premises of his own employer (App. B, *infra*, p. 41), and (2) picket lines at the premises of another employer established during a strike authorized by a union with which that employer is required to bargain (ibid. at 48). The Board also held that Section 8 (e) prohibits such contractual protection for the employee who refuses to handle goods originating from or equipment used by an employer engaged in a labor dispute (ibid. at 54). On two issues not before this Court, the Board voided Section 2 (a) of the agreement (ibid. at 50-51) and the article relating to subcontracting[4] (ibid. at 54-55).

The Court of Appeals Opinion.

Enforcing in part and setting aside in part, the Court of Appeals held:

1. **Picket Line.** The picket line clause was valid as applied to primary disputes at the contracting employer's own premises, and when applied to refusals to cross *lawful primary* picket lines at another employer's premises, even if the conditions outlined in the proviso to Section 8 (b)

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[4] Article 29 (a) of the Local Cartage Agreement and Article 47 (a) of the Over-the-Road Agreement provide:

> "The Employer agrees to refrain from using the services of any person who does not observe the wages, hours and conditions of employment established by labor unions having jurisdiction over the type of services performed."

(4) are not met—that is, even if the picket line is not in support of a strike approved by a union the struck employer is required to recognize under the Act. On the other hand, the Court ruled the picket line clause was unlawful under Section 8 (e) insofar as it immunized employees from discipline for not crossing picket lines at the contracting employer's own plant or at the plant of another employer if the picketing is "secondary" (App. A, *infra*, pp. 22, 27).

2. **Struck Work—Individual Rights.** The court agreed with the Board that this provision was prohibited by Section 8 (e) of the Act (ibid. at 31).

3. **Subcontracting.** The court reversed the Board's voiding of this clause (ibid. at 33). Accordingly, this clause is not in issue in this petition.

4. **Struck Work—"Ally" Doctrine.** The court held this clause unlawful because it went beyond the scope of the "ally" doctrine (ibid. at 30). No review is sought here from that ruling.

5. **Constitutionality.** The court upheld the constitutionality of Section 8(e) (ibid. at 34).

REASONS FOR GRANTING THE WRIT.

I.

Importance of the Questions.

Since its passage, almost five years ago, this Court has not considered the application and effect of Section 8 (e); though the Board and the Courts of Appeal have wrestled with its intricacies often.[5]

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[5] In its most recent publication (1964), the Section of Labor Relations Law of the American Bar Association, has noted, at p. 94

> "In the fourth year since Landrum-Griffin introduced section 8 (e)'s 'hot cargo' prohibitions, the Board continued its controversial search for congressional intent . . . without the

The importance of similar questions under the previous statute is attested to by the Court's opinions in *NLRB v. Rockaway News Supply Co.*, 345 U. S. 71 (1953), and *Local 1976, Carpenters v. NLRB*, 357 U. S. 93 (1958). Senator Kennedy in the course of Congressional debate characterized as "an extremely important question,"[6] the fashioning of the language which is now Section 8 (e).

More important than the plethora of litigation before the Board and the Courts of Appeal is the extent of controversy at the shop and freight dock reflected in the hundreds of daily questionings as to workers' rights and obligations in the interchange of goods and services. The ABA publication cited in footnote 5, *supra*, at p. 95, refers to the cases of which we here seek review as "two landmark decisions."

Moreover, while the decision below remains outstanding, employee protection of the type involved here will be effectively removed from the bargaining table. Few, if any, employers will agree to negotiate contractual provisions that the Board, with approval of the court, below has held to constitute an unfair labor practice.

II.

Error Below.

We turn first to the issues raised by the ruling below that Section 8 (e) is violated by Section 2 (b) of the agreement which protects the employee who refuses to

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benefit of an elucidating Supreme Court opinion evaluating the section's prohibitory scope or the constitutional question inherent in its proviso treatment of the construction and garment industries." Cf. NLRB Twenty-Eighth Annual Report, pp. 101-105; Twenty-Seventh Annual Report, pp. 222-227; Twenty-Sixth Annual Report, pp. 142-145.

[6] II Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 at 1162.

handle goods and equipment used by an employer engaged in a labor dispute.[7]

A. The Court Below Obliterated the Lines Congress Has Drawn Between Primary and Secondary Union Activity and Between Union and Individual Employee Activity, and Disregarded the Language of Section 8 (e) by Holding That This Section Prohibits Contract Provisions Designed for the Primary Purpose of Protecting Employees Who Have Personal Convictions Against Handling Goods and Equipment Used by Employers Engaged in Labor Disputes.

As its language shows (App. F, *infra*, p. 144), Section 8 (e) prohibits a union authorized to represent the employees of one employer from using its authority for the *secondary* purpose of negotiating provisions that " 'extend beyond the [contracting] employer and are aimed really at the union's difference with another employer' " (*Orange Belt District Council v. NLRB*, 328 F. 2d 534 at 538 (D. C. Cir. 1964)), but does not destroy the union's authority to act for the *primary* purpose of negotiating provisions for the benefit of the employees covered by the contract. In this way, Section 8 (e) supplements Section 8 (b) (4) without interfering with primary contractual provisions.

Consistent with this statutory scheme, the purpose of subsection 2 (b) of the Agreement is primary, not secondary; it is to protect from discharge the individual employee if he refuses to handle goods or equipment because *he* has convictions against aiding a struck employer to succeed in his dispute. Section 2 (b) is not intended to, nor does it, confer any power upon the union to control or to impede the employer's relations with struck employers. Its concern is with the impact upon the in-

[7] The discussion which follows applies, *mutatis mutandis*, with equal force to Section 1 of the agreement which protects the employee who honors a picket line.

dividual employee of the employer's decision to do business with an employer engaged in a labor dispute not with the decision itself. Cf. *John Wiley & Sons v. Livingston*, 376 U. S. 543 at 549 (1964); *NLRB v. Rapid Bindery*, 293 F. 2d 170 (2nd Cir. 1961).

Of course, this provision, despite its primary intent, may have incidental effects upon the signatory employer's relations with struck employers. These effects, however, depend not upon the union but upon the individual employees: Only if the number of employees willing to handle goods and equipment of a struck employer is insufficient (and the other means available to the signatory employer under the contract are ineffective, see, *infra*, pp. 14-15), will these incidental effects occur. If, on the other hand, the number of employees willing to handle such goods and equipment is sufficient, then these incidental effects will not occur.

The court below rejected the latter possibility by tacitly assuming that few, if any, union members would perform such work if they could refuse to do so without risking their jobs. In fact, there are union members who do perform this work. *J. A. Brown*, R. 243-244, 259, 290, 298-299, 316, 322, 404, 405; Cf. Lens, *The Crisis of American Labor*, 229-230 (Perpetua, 1961).

At the same time, there are union members who hold strong convictions against performing *any* work that would aid an employer engaged in a labor dispute and will only perform such work under threat of discharge. Indeed, a small number are willing to risk discharge rather than perform such work. See, e. g., *NLRB v. P. C. Kohler Swiss Chocolates Co.*, 130 F. 2d 503 (2nd Cir. 1942); *NLRB v. Montgomery Ward & Co., Inc.*, 157 F. 2d 486 (8th Cir. 1946); *Glenn Cartage Co. (Local 375, Teamsters)*, 146 NLRB No. 158 (1964).

It is because there are union members who hold such convictions that the clause was adopted.

If the sole purpose of collective bargaining were to set the price of labor, that is, to fix wages and hours, then a union could disregard these convictions. But an employee is not a commodity, a job entails more than earning a living, and an essential purpose of collective bargaining is to "add dignity to the position of labor and remove the feelings on the part of the worker that he is a mere pawn in industry subject to the arbitrary power of the employer." *NLRB v. Highland Park Mfg. Co.*, 110 F. 2d 632 at 638 (4th Cir. 1950); See also *AFL v. American Sash & Door Co.*, 335 U. S. 538 at 542-543 (1949) (Frankfurter, J., concurring).

Handling goods and equipment used by an employer engaged in a labor dispute engenders the same moral repugnance in many truck drivers that the loading of ships trading with Cuba engenders in many longshoremen. See *NLRB v. International Longshoremen's Association*, 332 F. 2d 992 at 998 (4th Cir. 1964). Therefore, to demand that a truck driver perform such work does more than rob him of whatever satisfaction his job gives him; it demeans him by forcing him to sacrifice his convictions to preserve his job. This is a high price to pay to keep a job, but the court below has ruled the truck driver must pay it—if his employer decides he must.

Although the court below failed to find that Section 2 (b) did more than eliminate the need for an employee to choose between his convictions and his livelihood, it nevertheless found that the provision violated Section 8 (e). In reaching this decision, it did not rely upon the language of Section 8 (e), "the very language in which Congress expressed its policy," (*Local 1976, Carpenters v. NLRB, supra*, at 100), but upon certain secondary materials and, in relying upon these materials, ignored the lines Congress has drawn separating primary from secondary union activity and separating union from individual employee activity. Although recognizing that

Section 8 (e) was directed against secondary activity (App. A., *infra*, p. 27), it concluded that a provision designed for the primary purpose of protecting the primary employees whom the union represents is not primarily[8] apparently because it protects an employee who individually decides to engage in an activity that a union is prohibited from inducing him to engage in. This conclusion fails to respect the Congressional view, enacted into law in 1947, that "unions and employees are not one." Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 Harv. L. Rev. 1, 47 (1947). Because of this view, the Act's prohibitions apply to union, not to individual employee, activity, and individual employee activity not induced by union activity does not, by attribution, become union activity. *Perry Norvell Co.*, 80 NLRB 225, 245 (1948); *Sunset Line & Twine Co.*, 79 NLRB 1487, 1507-1509. (1948); *Glenn Cartage Co. (Local 375, Teamsters)*, *supra;* Cf. *Atkinson v. Sinclair Refining Co.*, 370 U. S. 238 at 247-249 (1962).

Finally, the court below disregarded Section 2 (c) of the agreement which provides that the signatory employer shall continue to deal with struck employers and shall take the steps necessary to overcome whatever difficulties are caused by employees' refusal. Section 2 (c), therefore, serves to minimize the incidental effects of individual refusals and "'affirmatively to disclaim all illegal objectives.'" *NLRB v. News Syndicate Co.*, 365 U. S. 695 at 700 (1961).

That Section 2 (c) of the agreement is meaningful is demonstrated by this record, for (1) the struck employers were served by the contracting carriers using the very means envisaged by the contracts: supervisors, spot

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[8] Where the court below found the provisions in the contract to be primary, it upheld their legality (App. A. *infra*, p. 32).

leases, and other methods[9] (2) only twenty of the hundreds of employees of the contracting employers were shown to have refused to handle the struck freight;[10] and (3) the contracting carriers did not cease doing business with the struck employers.

Nevertheless, the court below transformed the parties' agreement, lawful on its face, into an illegal one contrary to the teachings of this court in *Carpenters Local 1976 v. NLRB, supra,* at 108, as well as in *NLRB v. News Syndicate Co., supra.*

B. The Court's Limitation on the Protection of Section 1 of the Agreement to Only Those Employees Who Honor Lawful Primary Picket Lines Effectively Undermines (1) the Contractual Protection, (2) the Right of Unions to Engage in Lawful Primary Picketing, and (3) the Statutory Right of Employees to Honor Picket Lines.

Recognizing "the union man's well known respect for and deep-seated reluctance to cross picket lines" (*NLRB v. Cone Bros. Constr. Co., Inc.,* 317 F. 2d 3, 8 (5 Cir. 1963)), the parties agreed in Section 1 of the agreement that the employee may refuse to cross a picket line without risk to his job. The decision below, however, limited the protection of Section 1 to employees who honor *lawful primary* picket lines.

As pointed out in footnote 7, p. 11, *supra,* the reasons which demonstrate the legality of Section 2 (b) of the

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[9] At least as many handled the struck goods. J. A. *Brown*, 243-244, 259, 290, 298-299, 316, 322, 404, 405.

[10] As found in *Patton*, ". . . the secondary employers dealt with Patton during the dispute by using supervisors and management representatives. . . ." (App. B, *infra*, p. 85). And in *Brown*, had the Union's offer of proof been received, it would have been even clearer that the contracting carriers "moved and handled freight to or from Brown through the usual complement of help of such carriers, supervisors, by railroad, spot leases and other means or methods of operation." (App. C, *infra*, p. 131, note 2.)

agreement also demonstrate the legality of Section 1 of the agreement, and, therefore, the error of limiting the protection which it provides. The following three reasons also demonstrate the error of the limitation adopted by the court below.

First, the limitation is unrealistic because it is impossible for an employee approaching a picket line to know whether it is lawful or unlawful, primary or secondary. Not having the time to investigate the facts or the training to evaluate their legal significance the employee, with his job at stake, is pressed to abandon his principles and cross all picket lines, including those that are lawful and primary. Hence, the limitation upon the protection for individual employees imposed by the court below impairs both the protection the parties sought to provide for the individual employee and the effectiveness of primary lawful picket lines.

Second, there is no need for such impairment; the Act provides adequate remedies against unlawful picketing. Whenever the Board concludes that there is "reasonable cause" to believe that picketing violates Section 8 (b) (4) or Section 8 (b) (7), it is required to seek a temporary injunction prohibiting such picketing (Section 10 (l) of the Act). Whenever the Board concludes that picketing violating other sections of the Act seriously interferes with the purposes of the Act, it may seek a temporary injunction prohibiting such picketing (Section 10 (j) of the Act). Temporary injunctions in labor disputes are effective. Cf. *Local 438 Construction & General Laborers' Union v. Curry*, 371 U. S. 542 at 550 (1962); Frankfurter and Greene, *The Labor Injunction* (MacMillan, 1930).

Third, as the Board's holdings in *Redwing Carriers, Inc.* (130 NLRB 1208, reconsidered, 137 NLRB 1545; aff'd 325 F. 2d 1011 (1963), cert. den. 377 U. S. 905 (1964)), and

L. G. Everest, Inc. (142 NLRB 193 (1963)),[11] recognize, an employee who honors a picket line is engaged in protected activity. In these cases the Board did not predicate its holdings upon the ground that the picket lines the employees honored were lawful, primary picket lines. Indeed, the Board did not even consider it relevant to ask, much less to decide, whether or not the picket lines in those cases were lawful. The ruling below, therefore, trenches upon the individual employee's statutory right to honor picket lines by preventing the parties from agreeing to provide meaningful safeguards for its exercise.

C. Section 8 (e) Violates the Fifth Amendment.

The garment and construction industries are exempted from the prohibitions of Section 8 (e). Despite its awareness that many other industries have "similar integrated processes of production" (Cong. Rec. House, Sept. 4, 1959, daily ed. 16,644), Congress without hearings arbitrarily exempted only these two industries. As a result, the exemptions of Section 8 (e) create arbitrary and irrational classifications, in violation of the Fifth Amendment. *Bolling v. Sharpe*, 347 U. S. 497 (1954); *Hirabayaski v. United States*, 320 U. S. 81 (1943); *Currin v. Wallace*, 306 U. S. 1 (1939); *Steward Machine Co. v. Davis*, 301 U. S. 548 (1937); *Norman v. Baltimore & Ohio Ry. Co.*, 294 U. S. 240 (1935); Cf. *Mayflower Farms v. Ten Eyck*, 297 U. S. 266 (1936).

Moreover, as the legislative history shows, Section 8 (e) would not have been enacted unless the exemptions were included. For this reason, the Court cannot simply excise the exemptions but should strike down the entire Section. *Morey v. Doud*, 354 U. S. 457, 469 (1957).

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[11] Enforcement denied, sub nom. *NLRB v. L. G. Everest, Inc.*, ... F. 2d ..., 56 LRRM 2866 (8th Cir. 1964).

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

Opinion of Court of Appeals

United States Court of Appeals
For the District of Columbia Circuit.

No. 17,662.

Truck Drivers Union Local No. 413, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, et al., Petitioners,

v.

National Labor Relations Board, Respondent.

No. 17,663.

Truck Drivers & Helpers Local Union No. 728, International Brotherhood of Teamsters, et al., Petitioners,

v.

National Labor Relations Board, Respondent Watson-Wilson Transportation System, Inc., et al., Intervenors.

Petitions to Review and Set Aside, and Cross-Petitions to Enforce, Orders of the National Labor Relations Board.

Decided April 9, 1964.

Mr. David Previant, with whom *Messrs. Herbert S. Thatcher* and *L. N. D. Wells, Jr.*, were on the brief, for petitioners in No. 17,662.

Mr. L. N. D. Wells, Jr., with whom *Messrs. David Previant* and *Herbert S. Thatcher* were on the brief, for petitioners in No. 17,663.

Mr. Gary Green, Attorney, National Labor Relations Board, with whom Messrs. *Arnold Ordman,* General Counsel, *Dominick L. Manoli,* Associate General Counsel, *Marcel Mallet-Prevost,* Assistant General Counsel, and *Melvin J. Welles,* Attorney, National Labor Relations Board, were on the brief, for respondent.

Mr. Robert T. Thompson, with whom *Mr. Alexander E. Wilson, Jr.* was on the brief, for intervenors in No. 17,663.

Mr. Mozart G. Ratner for Glass Bottle Blowers Association of the United States and Canada, AFL-CIO, *amicus curiae.*

Mr. Fred W. Elarbee, Jr. for Brown Transport Corporation, *amicus curiae* in No. 17,663.

Before Bazelon, *Chief Judge,* and Bastian and Wright, *Circuit Judges.*

Wright, *Circuit Judge*: The National Labor Relations Board has found certain Picket Line, Struck Goods, Subcontracting, and Hazardous Work clauses in the collective bargaining agreements of petitioner unions void under Section 8 (e)[1] of the Labor Act. In their Petition to Review and Set Aside, the unions contend that these provisions are outside the prohibitions of § 8 (e) because their aim is benefit to the employees of the bargaining unit, not control of, or interference with, the contracting employer's third-party relationships. The Board cross-petitions for enforcement.

A preliminary issue is whether it is the *object,* the *effect,* or the express or implied *terms* of the challenged clauses which are relevant to the § 8 (e) charge. The unions suggest an object test, by parity of reasoning with § 8 (b) (4) (B)[2]'s secondary boycott provisions. The Trial

[1] 73 Stat. 543, 29 U. S. C., § 158 (e).

[2] 73 Stat. 542-543, 29 U. S. C., § 158 (b) (4) (B).

Examiner, in one of these companion cases, No. 17,663, considered the effect of the clauses to be relevant to their validity under § 8 (e), and took extensive evidence of their effect. The Board, however, at the instance of its General Counsel, held that the implementation of a contract was not relevant to its validity under § 8 (e), that extrinsic evidence of object alone was not determinative, and that the contract must be tested by its terms, express or implied. See *Mary Feifer, d/b/a American Feed Company et al.*, 133 N. L. R. B. 214 (1961). We agree.

The Picket Line Clause.

A key provision in the union contracts protects the right of individual employees to refuse to cross picket lines by immunizing them against employer discipline. This picket line clause is broadly worded to achieve maximum application permitted by the law. The Board held that under § 8 (e) of the Act the clause may validly apply only to certain types of picket lines; the union apparently would apply it to all.

The clause provides:

> "It shall not be a violation of this Agreement and it shall not be cause for discharge or disciplinary action in the event an employee refuses to enter upon any property involved in a labor dispute or refuses to go through or work behind any picket line, including the picket line of Unions party to this Agreement and including picket lines at the Employer's place or places of business."

The Board concedes that the contract clause may permissibly operate to protect refusals to cross a picket line where the line is in connection with a *primary* dispute at the *contracting* employer's *own premises*. This seems clearly correct. Employees who refuse to cross such a

line are entitled to the same protection as strikers under Sections 7[3] and 13[4] of the Act. See *N. L. R. B. v. John S. Swift Company*, 7 Cir., 277 F. 2d 641, 646 (1960). The refusal to cross being a protected activity, the union and the employer may provide by contract that such refusal shall not be grounds for discharge. See *Labor Board v. Rockaway News Co.*, 345 U. S. 71, 80 (1953).

A different result must be reached where the picket line at the contracting employer's own premises is itself in promotion of a *secondary* strike or boycott. Refusal to cross that line would itself be secondary activity. To the extent that the clause would protect such refusal to cross, it would then be authorizing a secondary strike and would *pro tanto* be void under § 8 (e) of the Act. There is no merit to the unions' suggestion that this clause is outside the reach of § 8 (e) because it protects *individual* refusals, not *union*-induced *refusals*. We read our own cases as having rejected this argument. See *Los Angeles Mailers Union No. 9, Inter. Typo. U. v. N. L. R. B.*, 114 U. S. App. D. C. 72, 311 F. 2d 121 (1962).

The Board also held that the clause may validly protect refusals to cross a picket line at the premises of *another* employer if that picket line meets the conditions expressed in the *proviso* to § 8 (b) (4)[5] of the Act. Clearly this is the law. See *Labor Board v. Rockaway News Co.*,

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[3] 61 Stat. 140, 29 U. S. C., § 157.

[4] 61 Stat. 151, 29 U. S. C., § 163.

[5] The § 8 (b) *proviso* reads:

> "*Provided*, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter: * * *"

73 Stat. 543, 29 U. S. C., § 158 (b) (4).

supra; Meier & Pohlmann Furniture Company v. Gibbons, 8 Cir., 233 F. 2d 296, 301, cert. denied, 352 U. S. 879 (1956).

The remaining question concerns refusals to cross a picket line at *another* employer's premises where that line does *not* meet the conditions of the § 8 (b) (4) *proviso.* The unions maintain that refusal to cross any lawful primary picket line is primary activity under the Act and that protection thereof in the bargaining agreement falls outside the ambit of § 8 (e). The Board held that refusal to cross a non-*proviso* picket line constitutes secondary activity, and that contractual protection of such activity violates § 8 (e).

A useful approach to this question is through the legislative history of the 1959 amendments which incorporated § 8 (e) into the Act. The House Labor Committee report stated: "It is settled law that the National Labor Relations Act does not require a truckdriver to cross a primary picket line • • •. • • • [T]he employer could agree that he would not require the driver to enter the strikebound plant." House Committee Report, 1 Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 at 779 (1959).[6] It is also clear "that the right to refuse to cross a primary picket line

[6] Similar opinions as to the law are expressed in the Supplementary Views of five members of the Committee. 1 *id.* 838. Both the majority and concurring reports cite *Labor Board v. International Rice Milling Co.*, 341 U. S. 665 (1951). Congressman Elliott's analysis refers to "the right to refuse to cross the picket line where an employer is engaged in a primary labor dispute" as "already contained in the Taft-Hartley Act." 2 Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 at 1588 (3). And Senator Morse stated on the floor of the Senate: "I want to point out the Rockaway decision of the Supreme Court which makes clear that where there is a contract with an employer, a worker is protected in his refusal to go through a picket line, if the contract specifies that he has a right of refusal." 2 *id.* 1312. See *Labor Board v. Rockaway News Co., supra.*

would not be affected by" the hot cargo ban in the bill passed by the Senate. Kennedy-Thompson analysis, 2 *id.* 1708 (2-3).[7] "However, in order to set at rest false apprehensions on this score, the [House] committee appended the disclaimer proviso" which appears in the bill as reported by the House Committee.[8] This disclaimer explicitly protected the right of refusal to cross primary picket lines, and the right to sign contracts immunizing such refusals from employer discipline.[9] The entire House Committee bill, however, including this disclaimer, was replaced by the Landrum-Griffin substitute on the floor of the House. But the Landrum-Griffin substitute was unacceptable to the Senate conferees because:

"[T]he House [Landrum-Griffin] bill apparently destroys the right to picket a plant and to honor a picket line even in a strike for higher wages. This change in the present law is entirely unacceptable." 2 *Id.* 1708 (3). It seems clear that, at least on this point, the Senate viewpoint was adopted in conference, modifying the Landrum-Griffin version. The Senate conferees secured the insertion of the following broad and all-encompassing declaration of congressional policy in the bill: "*Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing." Section 8 (b) (4) (B).

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[7] As Senator Morse's analysis had it, "The Senate bill was not intended to affect the rights of anybody in connection with a primary strike or picket line." 2 *id.* 1326 (1). The Supplementary Views of the five House Committee members stated: "The language of the 'hot cargo' ban in [the Senate bill]—which your committee adopted [for the House Committee bill]—did not impinge in any way on existing law concerning the crossing, or not crossing, of primary picket lines by employees." 1 *id.* 838; see also *id.* at 849.

[8] Supplemental Views, 1 *id.* 838; see also Senator Morse's remarks, 2 *id.* 1326 (1).

[9] See *id.* 755-756.

The then Senator Kennedy explained the effect of this new provision to the Senate:

> "• • • The secondary boycott provisions of the House bill would have curtailed legitimate union activities. Accordingly, the Senate conferees insisted that the report secure the following rights:
>
> "(a) The right to engage in primary strikes and primary picketing even though the employees of other employers refused to cross the picket line.
>
> "The fact of the matter is that there is some question under the Landrum-Griffin bill whether employees of another employer could have properly refused not [sic] to cross a picket line in a primary strike. That has been clarified in the conference report."

2 Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 at 1432-1433.

Senator Kennedy further stated in a report to the Senate on the Conference: "We have protected the right of employees of a secondary employer, in the case of a primary strike, to refuse to cross a primary strike picket line." 2 *Id.* 1389 (1). This stated effect of the Senate-House Conference action seems to have been generally accepted. A speech of Senator Douglas inserted in the Congressional Record shortly afterward explained:

> "Under the compromise, we also protected the right of employees of a secondary employer to refuse to cross a picket line in the case of a primary strike. The Landrum-Griffin bill, as written, appeared to take this right away."

2 *Id.* 1834 (1).

In addition, Professor Cox, now the Solicitor General, who was one of the principal architects of the legislation, has confirmed that the intendment of the Act is that

"section 8 (e) would not prohibit agreements sanctioning refusal to cross a lawful primary picket line."[10]

It would seem that even without this legislative history, a similar conclusion would be demanded by the case law. It has been clear since *Rockaway News* that whenever refusal to cross a picket line is a protected activity, unions and employers may sign contracts providing that the refusal shall not be ground for discharge. In *Rockaway News* the activity in question was within the § 8 (b) (4) *proviso*, but the Court did not limit the principle there announced to *proviso* activity. The Board itself recently held in the *Redwing*[11] and *Everist*[12] cases that refusal to

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[10] "* * * The fear has been expressed that the prohibition [§ 8 (e)] would invalidate agreements sanctioning conduct like the refusal of the truck drivers to cross the picket line at our hypothetical Modern Furniture Co. plant. However, the rationale of the new law points to a narrower interpretation. Section 8 (b) (4) (A) refers to all inducements of employees of a secondary employer which are directed toward forcing him 'to cease using, selling, handling, transporting or otherwise dealing in the products of any other producer, processor or manufacturer, or to cease doing business with any other person.' But under the *Rice Milling* case and the new confirmatory proviso, * * * it does not constitute an unlawful secondary boycott to induce employees to refuse to cross a primary picket line where the refusal causes the secondary employer to cease doing business with the primary employer *at the site of the labor dispute*. The same words are repeated in outlawing 'hot cargo' agreements. The prohibition was drafted in aid of the restriction upon secondary boycotts. The same distinction based upon the situs should therefore be observed, with the result that section 8 (e) would not prohibit agreements sanctioning refusal to cross a lawful primary picket line." Cox, *The Landrum-Griffin Amendments to the National Labor Relations Act*, 44 Minn. L. Rev. 257, 272-273 (1959).

Other distinguished commentators have also read Senator Kennedy's conference report, and the "primary strike" amendment itself, as "specifically" intending that "employees of another employer may lawfully refuse to cross a picket line in a primary strike." Goldberg & Meiklejohn, *Title VII: Taft-Hartley Amendments, with Emphasis on the Legislative History*, 54 Nw. U. L. Rev. 747, 768 (1960).

[11] *Redwing Carriers, Inc., et al.*, 137 N. L. R. B. 1545 (1962).

[12] *L. G. Everist, Inc., et al.*, 142 N. L. R. B. No. 20 (1963).

cross a primary picket line was indeed a protected activity, without even considering whether the picket lines met the terms of the § 8 (b) (4) *proviso*. And in *Redwing*, we affirmed the Board's holding "that the employees had in fact engaged in *protected* concerted activity when they refused to cross the picket line," also without regard to whether the *proviso* was satisfied. *Sub nom. Teamsters, Chauffeurs & Helpers Local U. No. 79 v. N. L. R. B.*, ... U. S. App. D. C. ..., ..., 325 F. 2d 1011, 1012 (1963). In fact, we are aware of no case which limits protection of refusal to cross a primary picket line to § 8 (b) (4) *proviso* situations.

Similar conclusions are suggested by *Labor Board v. International Rice Milling Co., supra*, Note 6, and *Electrical Workers Local 761 v. Labor Board*, 366 U. S. 667 (1961). Since "appealing to neutral employees whose tasks aid the employer's everyday operations" is a "traditional primary activity," *id.* at 681, primary picketing retains its primary characteristic even though it induces deliverymen to refuse to cross the line. Thus it seems clear that refusal to cross a lawful primary picket line, absent demonstrated secondary intent, is itself primary, and as such falls outside the Act's proscriptions against secondary activity. *Teamsters, Chauffeurs & Helpers Local U. No. 79 v. N. L. R. B., supra.* Compare *Seafarers International Union, etc. v. N. L. R. B.*, 105 U. S. App. D. C. 211, 216, 265 F. 2d 585, 590 (1959). Since § 8 (e) is limited to secondary activity, a provision in the bargaining agreement immunizing the exercise of this protected right against employer discipline does not violate it. See *Labor Board v. Rockaway News Co., supra.*

The Struck Goods Clause.

A second section of the collective bargaining agreement which is in dispute concerns Struck Goods. It reads:

"Recognizing that many individual employees covered by this contract may have personal convictions against aiding the adversary of other workers, and recognizing the propriety of individual determination by an individual workman as to whether he shall perform work, labor or service which he deems contrary to his best interest, the parties recognize and agree that:

"[(a)] It shall not be a violation of this Agreement and it shall not be a cause for discharge or disciplinary action if any employee refuses to perform any service which, but for the existence of a controversy between a labor union and any other person (whether party to this Agreement or not), would be performed by the employees of such person.

"[(b)] Likewise, it shall not be a violation of the Agreement and it shall not be a cause for discharge or disciplinary action if any employee refuses to handle any goods or equipment transported, interchanged, handled or used by any carrier or other person, whether a party to this Agreement or not, at any of whose terminals or places of business there is a controversy between such carrier, or person, or its employees on the one hand and a labor union on the other hand; and such rights may be exercised where such goods or equipment are being transported, handled or used by the originating, interchanging or succeeding carriers or persons, whether parties to this agreement or not.

"[(c)] The Employer agrees that it will not cease or refrain from handling, using, transporting, or otherwise dealing in any of the products of any other employer or cease doing business with any other person, or fail in any obligation imposed by the Motor Carriers' Act or other applicable law, as a result of individual employees exercising their rights under

this Agreement or under law, but the Employer shall, notwithstanding any other provision in this Agreement, when necessary, handle, use, transport or otherwise deal in such products and continue doing such business by use of other employees (including management and representatives), other carriers, or by any other method it deems appropriate or proper."

In considering clause (a) of this section, the Board acknowledged that it may lawfully apply where the relationship between the contracting employer and the employer with a labor dispute is so close as to render them "allies". The present state of the struck work—ally doctrine is outlined in *Douds v. Metropolitan Federation of Architects, etc.*, S. D. N. Y., 75 F. Supp. 672 (1948), and *National Lab. Rel. Bd. v. Business Machine & Office Appliance Mechanics*, 2 Cir., 228 F. 2d 553 (1955), *cert. denied*, 351 U. S. 962 (1956). These cases are specifically cited in the conference report on the 1959 amendments, as representing the existing law which Congress did not intend to supersede. 1 Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 at 942. Under these decisions, an employer is characterized as an "ally" of the struck firm "when he knowingly does work which would otherwise be done by the striking employees of the primary employer and where this work is paid for by the primary employer pursuant to an arrangement devised and originated by him to enable him to meet his contractual obligations. The result must be the same whether or not the primary employer makes any direct arrangement with the employers providing the services." *National Lab. Rel. Bd. v. Business Machine & Office Appliance Mechanics, supra*, at 559. As Judge Learned Hand phrased the test: "One does not make oneself a party to the dispute with a primary employer by taking over the business that the strike has prevented him from doing. On the other hand if a secondary employer, knowing of

the strike, not only accepts the customer of the primary employer but takes his pay, not from the customer but from the primary employer * * * [then he has] made common cause with the primary employer." Concurring opinion, *id.* at 562. This court has adopted the ally doctrine in *New York Mailers' Union No. 6, Inter. Typo. U. v. N. L. R. B.*, 114 U. S. App. D. C. 370, 371, 316 F. 2d 371, 372 (1963).

The Trial Examiner found clause (a) to be limited in scope to the "ally" doctrine, and therefore valid. But the Board read the clause as impermissibly broad, in that under it employees of the contracting employer might refuse to perform services which met the *first* test of *Business Machine, supra* ("otherwise done by the striking employees"), even if the *second* test of that rule were not met ("pursuant to an arrangement"). But *cf. N. L. R. B. v. Amalgamated Lithographers of America (Ind.)*, 9 Cir., 309 F. 2d 31, 37-38 (1962), *cert. denied*, 372 U. S. 943 (1963).

We agree with the Board that to the extent clause (a) protects refusals to work beyond the scope of the ally doctrine, it authorizes a secondary boycott, and so is *pro tanto* void under § 8 (e) of the Labor Act. We refrain from defining the exact limits of the ally doctrine, however, and do not decide whether the *Business Machine* tests are adequate for all variations in factual situations. Such spelling out is best left for the elucidating process of gradual inclusion and exclusion provided by specific cases.

Clause (b) of the Struck Goods section, set out above, seems to be a typical hot cargo clause, prohibited by § 8(e) of the Act. The unions contend, however, that this clause—like others in the contract—is immune from § 8(e)'s prohibition because it protects the freedom of decision of the individual laborer, rather than creates a power

of decision in the union itself. Since few workers will exercise their rights under these clauses, the unions argue, there will be no substantial interference with the business of the employer, particularly in view of the provisions of clause (c). The short answer to this contention is that it has already been rejected by this court. See *Los Angeles Mailers Union No. 9, Inter. Typo. U. v. N.L.R.B., supra.* See also *New York Mailers Union No. 6, Inter. Typo. U. v. N.L.R.B., supra; Employing Lithographers of Greater Miami v. N.L.R.B.*, 5 Cir., 301 F. 2d 20 (1962); *N.L.R.B. v. Amalgamated Lithographers of America (Ind.), supra;* and *Brown v. Local No. 17, Amalgamated Lithographers*, N. D. Cal., 180 F. Supp. 294 (1960). Moreover, the legislative history of the 1959 amendments equates these "employee-rights" clauses with other hot cargo clauses. It is clear that § 8(e) was aimed, among other targets, at provisions in contracts under which an employer agrees: he cannot "require his employees to handle any [goods] which • • • came from an employer engaged in a labor dispute," 1 Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 at 779 (House Report); he cannot "require his employees to handle goods or provide other services for the benefit of an employer who is involved in a labor dispute," 2 *Id.* at 1007 (Senator McClellan); "that his employees do not have to handle goods which the union labels as 'hot,' " 2 *Id.* at 1197 (Senator Curtis); "his employees do not have to handle or work on goods produced or handled by another employer who happens to be in disfavor with the union," 2 *Id.* at 1079 (Senator Goldwater); he will "not • • • carry the goods and not • • • require his employees to handle them," 2 *Id.* at 1708 (Kennedy-Thompson analysis).

We must conclude, therefore, as did the Board, that this clause (b) is void under § 8(e) of the Act and that clause (c) does not save it.

The Subcontracting Clause.

The third major challenged provision of the collective bargaining agreements here concerns Subcontracting:

> "The Employer agrees to refrain from using the services of any person who does not observe the wages, hours and conditions of employment established by labor unions having jurisdiction over the type of services performed." [13]

The Board found this clause was secondary, and therefore void under § 8(e) of the Act. It reasoned:

> "Like the typical hot cargo clause itself, a subcontractor clause is secondary where it limits, *not the fact of subcontracting*—either prohibiting it outright or conditioning it upon, e. g., current full employment in the unit—but the *persons with whom* the signatory employer may subcontract. * * *"

This Board position groups together, as secondary, contract clauses which impose boycotts on subcontractors not signatory to union agreements, and those which merely require subcontractors to meet the equivalent of union standards in order to protect the work standards of the employees of the contracting employer. But the distinction between these two types of clauses is vital. Union-signatory subcontracting clauses are secondary, and therefore within the scope of § 8(e), while union-standards subcontracting clauses are primary as to the contracting employer. We so held in *Building & Construction Trades Council v. N. L. R. B.*, ... U. S. App. D. C. ..., ... F. 2d ... (No. 17,387, decided January 30, 1964). We drew this same distinction in *Orange Belt District Council of Painters No. 48 v. N. L. R. B.*, ... U. S. App. D. C. ..., ... F. 2d

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[13] Since this clause is entitled "Subcontracting," we assume—in the absence of any indication to the contrary—that its scope is limited to the contracting out of work which otherwise would be performed by members of the bargaining unit.

... (No. 17,388, decided January 30, 1964); in *District No. 9, International Ass'n of Machinists v. N. L. R. B.*, 114 U. S. App. D. C. 287, 315 F. 2d 33 (1962); and in *Retail Clerks Union Local 770 v. N. L. R. B.*, 111 U. S. App. D. C. 246, 296 F. 2d 368 (1961).

This clause would be a union-signatory clause if it required subcontractors to have collective bargaining agreements with petitioner unions or their affiliates, or with unions generally. We interpret it, however, as merely requiring that subcontractors observe the equivalent of union wages, hours, and the like.[14] Since we find that this clause only requires union standards, and not union recognition, we follow the line of cases in this court cited above to rule it primary, and thus outside §8(e)'s prohibitions[15]

Other Issues.

Some further points remain. The Board also asks enforcement of that part of its order voiding a Hazardous Work clause, which it reads as imposing penalty wage and benefit rates, designed to compel employer adherence to the Picket Line and Struck Goods sections, to take effect if these sections should be held illegal. The unions contend that this clause merely provides reasonable protections for an employee who is compelled to face the dangers of a picket line. This section was never adopted by the unions and the employers as part of their permanent contract; it was contained in a preliminary agreement

[14] The Board's processes are adequate, we take it, to insure that substantial compliance with union standards or the equivalent will suffice under such a clause, and that the union will not be allowed to use it as a device to limit subcontracting to union firms.

[15] In view of this disposition, it is unnecessary to consider the unions' argument based on the possible difference in meanings between "cease" and "refrain" as used in § 8 (e). Compare *Hoffman v. Teamsters Joint Council No. 38*, N. D. Cal., Civil No. 8470, 45 CCH Lab. Cas., ¶ 17,803 (1962).

which was in force temporarily, but was deleted before final signature. Thus the unions and employers have repudiated the section. The Board has not shown any likelihood that this or a similar agreement would, if not prohibited, be included in any future bargaining contract. Moreover, the Trial Examiner ruled that this section was not in the case, and, as the unions contend, it was never adequately litigated before the Board. Thus we do not know the extent of danger involved in crossing a picket line in this industry. Compare *Teamsters, Chauffeurs & Helpers Local U. No. 79 v. N. L. R. B., supra.* Though we recognize that the mere cessation of an unfair labor practice does not destroy the jurisdiction of the Board and the courts to issue appropriate orders, under the circumstances of this case we are moved to refrain from deciding upon the validity of this clause. We therefore set aside this portion of the Board's decree, without prejudice to further proceedings on this issue if the Board feels them necessary.

The unions have also raised the suggestion that § 8(e) is arbitrary and unconstitutional because of the special treatment of the garment and construction industries. This argument has already been rejected by several courts. *Employing Lithographers of Greater Miami v. N. L. R. B., supra,* at 24-27; *N. L. R. B. v. Amalgamated Lithographers of America (Ind.), supra,* at 45; *Brown v. Local No. 17, Amalgamated Lithographers, supra,* at 305-306. We have been shown no adequate reason why we should not follow their lead. Courts today no longer sit in review of the economic wisdom of the distinctions drawn by the legislature, and the failure to grant exemption from § 8 (e) to all industries which claim they merit an exemption does not void the Act. In this connection, we note that the unions in the trucking industry were the prime target of congressional concern. We hold § 8 (e) to be constitutional.

There remains the question of the appropriate relief. As to some sections of the contract, we have found the clauses to have a valid scope of operation under the law, but to be prohibited by law from operating outside that scope. Though the Board's decree is ambiguous, a section of its opinion suggests that in such a situation of partially-valid clauses, the entire clauses as written should be struck down.[16] If this is the Board's view, we do not agree.

Ordinarily, the rubric of not rewriting the contract for the parties does bear some relation to labor contracts. Every collective bargaining agreement is the resultant of opposing forces, representing their relative strengths and positions. To limit clauses won by one side, while leaving in effect the remainder of the contract, would upset the balance struck at the bargaining table. Indeed, these considerations would suggest that, not just the challenged clauses, but the entire labor contract should be voided as a whole, if one part must be struck down.

But these considerations do not govern in situations such as here. This is not a case where the unions, by sacrificing other dearly desired privileges, have won from employers acceptance of clauses in the contract, clearly intended to confer union rights, but later found to violate the Act. Rather the clauses here seem purposefully to be drawn in broad terms to achieve maximum application permitted by the new amendments to the Act. Both unions and employers must have anticipated that these amendments would not permit the clauses to be given the most expansive reading the bare words allowed. A more narrow reading, or even a partial excision, must have been within the contemplation of the experienced counsel

[16] Compare *Employing Lithographers of Greater Miami v. N. L. R. B., supra*, with *N. L. R. B. v. Amalgamated Lithographers of America (Ind.), supra.*

who purposefully cast the clauses in such general terms. To borrow the language of the Supreme Court in *Labor Board v. Rockaway News Co., supra,* at 78-79, "The parties, who could not foresee how some of the provisions of the statute would be interpreted, proposed to go as far toward union security as they are allowed to go, and this is their right; and they proposed to go no farther, and that is their whole duty." Where the parties "have misunderstood the legal limits of their bargain," if possible, "the excess may be severed and separately condemned • • •." *Ibid.*[17]

We therefore conclude that a decree should be drafted condemning the challenged contract clauses only to the extent found unlawful by this court.

Enforced in part and set aside in part.

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[17] See *Local Lodge No. 1417, Int'l Ass'n of Machinists v. N. L. R. B.*, 111 U. S. App. D. C. 235, 236-237, 296 F. 2d 357, 358-359 (1961); *cf. N. L. R. B. v. Amalgamated Lithographers of America (Ind.), supra;* see also *Manning v. Ellicott*, 9 App. D. C. 71, 81 (1896); Restatement, Contracts, § 607, *Comment a.*

APPENDIX B.

United States of America.

Before the
National Labor Relations Board.

Cases Nos. 9-CE-5-1-2.

Truck Drivers Union Local No. 413, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and Central States Drivers Council, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,

and

The Patton Warehouse, Inc.,

and

Arkansas Best Freight System, The Cleveland, Columbus and Cincinnati Trucking Co., C. and D. Motor Delivery, Inc., Dixie Ohio Express, Haeckl's Motor Freight, Huey Motor Express, Inc., W. L. Mead, Inc., Consolidated Freightways, Reinhardt Transfer Co., Suburban Motor Freight, Inc., The White Transportation Co.,

Parties to Central States Area Local Cartage Agreement,

and

Alpha Lines, Inc., Arkansas Best Freight System, Cleveland, Columbus & Cincinnati Highway, Inc., C and D Motor Delivery Co., Motor Freight Corp., Haeckl's Motor Freight, W. L. Mead, Inc., Consolidated Freightways, Suburban Motor Freight, Reinhardt Transfer Co., The White Transportation Co.,

Parties to Central States Area Over-the-Road Motor Freight Agreement, and Ohio Rider.

Decision and Order.

On November 7, 1961, Trial Examiner Eugene F. Frey issued his Intermediate Report in the above-entitled proceeding, finding that the Respondents had engaged in and were engaging in certain unfair labor practices and recommending that they cease and desist therefrom and take certain affirmative action as set forth in the Intermediate Report attached hereto. Thereafter, the Respondents filed exceptions to the Intermediate Report together with a supporting brief. The General Counsel filed limited exceptions to the Intermediate Report with a statement in support thereof. On December 20, 1961, the Board heard oral argument in Washington, D. C., in which all parties were given an opportunity to appear and participate.[1]

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and briefs,[2] the oral argument, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner as amplified and modified in this Decision and Order.

The parties stipulated at the hearing that the Respondents and certain Employers and Employer Associations have executed and are currently parties to two collective-bargaining agreements. These are an "Over-the-Road Motor Freight Agreement" and a "Local Cartage Agreement" covering drivers employed in the Central States

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[1] Because of the similarity of the issues involved, this matter was consolidated for purposes of oral argument with *Truckdrivers and Helpers Local Union No. 728 et al. (Brown Transport Corp.)*, 140 NLRB No. 137, issued today.

[2] Briefs *amicus curiae* were filed in the *Brown Transport* matter prior to the oral argument, by the AFL-CIO and by a number of International Unions. They have been considered in the determination of this case.

area, comprising all or parts of 14 States from West Virginia to Nebraska. The complaint alleged that certain provisions of these collective-bargaining agreements amount to illegal "hot-cargo" agreements within the meaning and proscription of Section 8 (e) of the Act. Section 8 (e) reads in pertinent part as follows:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void; provided . . .

1. In their exceptions to the Intermediate Report issued in the companion *Brown Transport* case, *supra,* the Respondents raised certain contentions as to the constitutionality of Section 8 (e) and as to the scope and meaning of that Section, which have been incorporated by reference into the instant case. These contentions have been fully considered in the attached Intermediate Report. The Respondents argue that Section 8 (e) denies them due process of law since it allegedly establishes "irrational classifications," in its exemption from Section 8 (e), of certain types of agreements which may be entered into in the construction and apparel industries. The Board's position has always been that it must assume the constitutionality of the Act which it is called upon to administer, in the absence of a binding court decision to the contrary. Accordingly, we reject this argument of the Respondents.[3]

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[3] *Amalgamated Lithographers of America (The Employing Lithographers, etc.),* 130 NLRB 985, 991, enforced as modified

The Respondents also argue that the challenged contract clauses, to be discussed below, do not constitute an express contract or agreement within the scope of Section 8 (e), whether they are considered individually or collectively. These arguments have been fully considered in the Intermediate Report and the Board adopts the reasoning and conclusion of the Trial Examiner that the operative paragraphs of Article 9, Section 2 of the Agreements fall within the scope of Section 8 (e) of the Act.[4]

2. Article 9 of both agreements reads identically and is set out in full in the Intermediate Report. In order to facilitate discussion of its individual sections, we shall also set them out separately at appropriate places in our Decision and Order. Article 9 is headed "Protection of Rights" and its first section reads as follows:

> Section 1—Picket line. It shall not be a violation of this Agreement and it shall not be cause for discharge or disciplinary action in the event an employee refuses to enter upon any property involved in a labor dispute or refuse to go through or work behind any picket line, including the picket line of Unions party to this Agreement and including picket lines at the Employer's place or places of business.

This section provides that employees may with impunity refuse to enter any property involved in a labor dispute and may refuse to cross or work behind any

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in other respects, 309 F. 2d 31 (C. A. 9). To the same effect see, *The Employing Lithographers v. N. L. R. B.* (*Miami Post Company*), where the Court of Appeals for the Fifth Circuit held that the exemption of the apparel industry did not render Section 8 (e) unconstitutional as a violation of the due process clause of the Fifth Amendment. 301 F. 2d 20 (C. A. 5), enforcing 130 NLRB 968.

[4] See also, *Amalgamated Lithographers, supra*; *The Employing Lithographers v. N. L. R. B., supra*, and *Amalgamated Lithographers of America*, 137 NLRB No. 179, pages 9 and 10 of the Intermediate Report.

picket line, specifying particularly but without limitation picket lines established by the Respondents and picket lines at the places of business of employers who are parties to the agreement. The Trial Examiner concluded that Section 1 did not violate Section 8 (e) of the Act insofar as it granted employees protection against their refusal to enter their own employer's premises during a labor dispute or to cross a picket line lawfully established there. He also concluded, however, that insofar as Section 1 attempted to immunize employees against disciplinary action for refusing to cross a primary picket line at the premises of employers who are not parties to the agreement, it is an illegal attempt to curtail or to cause a cessation of business between the primary or struck employer, and the trucking firm or secondary employer, whose employees refuse to cross the picket line.

To the extent that the right of employees not to cross a picket line at their own employer's place of business is primary activity protected by Sections 7 and 13 of the Act, there can be no doubt that the picket line clause is, as the Trial Examiner found, not violative of Section 8 (e) in obtaining immunity from disciplinary action for such employees.

We are not wholly in agreement, however, with the Trial Examiner's conclusion that the picket line provision would, under all circumstances, violate Section 8 (e) insofar as it attempts to safeguard the jobs of employees who refuse to cross a picket line established at the premises of an employer other than their own. The Trial Examiner reasoned that an employer does not violate Section 8 (a) (3) by disciplining an employee who refuses to cross a picket line at another employer's place of business,[5] but that if this right to discipline is given up by

[5] Since the issuance of the Intermediate Report, a majority of the Board has held that the refusal to cross a picket line at another employer's premises is protected activity, and the employer

agreeing to a "picket line" clause, the neutral employer thereby agrees to cease doing business with the primary employer in violation of Section 8 (e). Relying on the legislative history of the Landrum-Griffin Act, the Trial Examiner concluded that it was the Congressional intent in enacting Section 8 (e) to insulate neutral employers from the pressure to cease doing business with a struck employer, by outlawing picket line clauses. He distinguishes the right of strikers at a primary picket line to persuade the employees of other employers not to cross, from a contractual provision which grants immunity to employees who refuse to cross a picket line. He was of the opinion that the Section 8 (b) proviso[6] saves unions from Section 8 (b) (4) violations when employees refuse to cross a picket line at another employer's place of business; however, he deems Article 9, Section 1 of the Agreements involved here to violate Section 8 (e), because he believes that the Section 8 (b) proviso is limited in its application to Section 8 (b) (4) and does not apply to Section 8 (e). We believe that his analysis fails to take into account in interpreting Section 8 (e), that Congress meant to preserve in Section 8 (e) the limitations and safeguards with respect to certain types of secondary activities which had already been incorporated into Section 8 (b) (4).

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of employees who refuse to cross may not discriminate against them for their refusal. *Redwing Carriers, Inc.*, 137 NLRB No. 162. The case also holds that an employer does have a right to attempt to run his business despite the sympathetic action of his employees who refuse to cross a picket line, and in doing so may replace them, thereby effectuating their discharge. There was no contractual provision in that case dealing with the power to discharge for failing to cross.

[6] The provision reads: "Provided, that nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act. . . ."

We view the admittedly difficult problem of ascertaining the meaning of the statute in the light of the expressed Congressional intent as to its scope and purposes, from a different perspective. Our primary concern, it seems to us, must be to determine what the status of picket line clauses was before the enactment of Section 8 (e) and then to determine whether, and in what respects, Congress changed the existing law. The legality of a contractual agreement to grant immunity from discipline to employees who refuse to cross picket lines was considered by the Supreme Court in *N. L. R. B. v. Rockaway News Supply Co.*, 345 U. S. 71. The Court held there that a bargaining agreement could validly provide either that an employee may or that he may not be required to cross a picket line. In its opinion, the Court said, at 345 U. S. 80:

> In the section by which the Labor Management Relations Act proscribes certain practices of labor organizations which shall be deemed unfair, there is a proviso that nothing therein "shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer) if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act. . . ." This clearly enables contracting parties to embody in their contract a provision against requiring an employee to cross a picket line if they so agree. And nothing in the Act prevents their agreeing upon contrary provisions if they consider them appropriate to the particular kind of business involved. An employee's breach of such an agreement may be made grounds for his discharge without violating § 7 of the Act. *N. L. R. B. v. Sands Co.*, 306 U. S. 332, 334.

Thus, prior to the 1959 amendments, it appears that the *Rockaway* case stood for the proposition that a contractual

provision by which an employer agreed not to discipline an employee for failing to cross a picket line at another employer's premises would be legal, at least to the extent that the provision did not go beyond the Section 8 (b) proviso. We note that the Section 8 (b) proviso was held to be pertinent in *Rockaway News*, which was not a secondary boycott case, but a case involving the meaning of Section 8 (a) (3).

Members of Congress and witnesses at the legislative hearings on the 1959 amendments expressed a concern as to whether Section 8 (e) was intended to prohibit a contractual provision for immunity from discipline for employees who refused to cross picket lines. Thus, Senator Morse said:

> I want to point out the *Rockaway* decision of the Supreme Court which makes clear that where there is a contract with an employer, a worker is protected in his refusal to go through a picket line, if the contract specifies that he has a right of refusal. I am very much disturbed by legislative movements in the Congress that would seek to destroy that protection. A "hot cargo" amendment which, in my judgment, makes it illegal to sign an agreement which would permit employees to refuse to go through picket lines is vindictive.[7]

A substantial portion of the legislative debate over Section 8 (e) was devoted to allaying the fears expressed that Section 8 (e) might have the effect of outlawing agreements which incorporated the traditional union practice of honoring picket lines established by other unions. Thus, Senator Morse inserted into the Congressional Record a letter from Senator Kennedy to Mr. Hoffa, president of the Teamsters, which read in part as follows:[8]

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[7] 105 Cong. Rec. 13576.

[8] 105 Cong. Rec. 13874.

> 1. Hot Cargo: Your analysis maintains that section 707 of S. 1555[9] would require a trucking employee to go through a picket line or lose his job. There is no requirement in section 707 that an employee must go through a picket line and certainly nothing in the section which necessitates that such an employee be discharged, if he does [not]. As a matter of fact, the Taft-Hartley Act already protects the right of an employee to refuse to cross the picket line of an employer other than his own employer, if the employees of such an employer are engaged in a strike ratified or approved by a representative of such employees. Section 707 makes no change in this provision of existing law.

During the House debate, Congressman Cramer summarized the results of his research on the objection raised by the Teamsters to Section 8 (e), that employees who refused to become strikebreakers could lose their jobs, as follows:[10]

> What the Teamsters and their kind are trying to accomplish by their attack on the hot cargo provision is an amendment to the Taft-Hartley Act which would legalize the refusal of a union member to cross a picket line set up by "wildcat strikers" and minority pickets who did not have the approval of the employees working in the picketed plant. An employee should be aware of the fact that his right to cross a picket line is restricted. He can lose his job if he refuses to cross a picket line set up by a minority of the employees or of a group of employees without authorization of the majority union in the appropriate

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[9] Sec. 707 (a) of S. 1555 proposed to add a new subsection (e) to Section 8 of the Act. It was incorporated into the final bill, with changes not material here, as the present Section 8 (e).

[10] 105 Cong. Rec. 15677.

unit. However, he should also be aware of the right he has under the Taft-Hartley and also the Landrum-Griffin bill which can be used to prevent his discharge for failing to cross a picket line so long as such picket line has been ratified by the majority union of the employees in the appropriate unit.

Thus, I have reached the following, and I believe correct, conclusion on the question raised:

First. The Landrum-Griffin hot-cargo provision puts in statutory form the existing rule of the NLRB and the courts, including the Supreme Court, that hot-cargo contracts are unenforcible. It is [sic] no sense disturbs the further rule under which employers may agree with the contracting union that an employer may—or may not—be disciplined for refusal to cross a picket line at another employer's establishment. No reasonable interpretation of the language gives it such a meaning that would interfere with this rule and no such interpretation is intended.

Second. The proviso in 8 (b) (4) of the Taft-Hartley Act, which specifically affords protection to the individual employee who would not cross a picket line, is carried forward by the Landrum-Griffin bill. As picketing situations arising from hot-cargo disputes are described in that section [8 (b) (4)] it would protect the employee even though section 8 (e), that is, the hot-cargo section, also specifically applied.

Third. What the Teamsters and their kind want is full and unrestrained leeway to refuse to cross any picket line at their discretion, regardless of whether it is established by a union entitled to representation rights.

Fourth. To conclude that the language of 8 (e) bans an agreement not to discipline employees who refuse to cross the picket line reads into it a mean-

> ing that the wording of the section simply does not incorporate. What the wording clearly does is to describe as an unfair labor practice a hot-cargo contract between an employee [employer] and a labor organization and then pronounce it unenforcible and void. Nothing is said in the section about the individual employee. Nothing in the language requires him to go through picket lines and nothing in it imposes a duty on the employer to discharge him if he refuses.

Finally, House Report 741 on H. R. 8342 stated, in reporting on the bill as passed in the Senate (S. 1555): . . .

> It is settled law that the National Labor Relations Act does not require any employee to cross a primary picket line and that pickets may request him not to cross a picket line (*N. L. R. B. v. International Rice Milling Company*, 341 U. S. 665). The language of the "hot cargo" ban in S. 1555—which your committee adopted—did not impinge in any way on existing law concerning the crossing, or not crossing, of picket lines by employees. However, in order to set at rest false apprehensions on this score, the committee appended the disclaimer proviso which appears in Section 705 (a) (2) of the bill.

The Trial Examiner has pointed out that the disclaimer proviso was not included in the Conference Bill which eventually became the 1959 Act, and inferred that its absence from the bill as finally passed, indicates that picket line clauses were not to be exempted from the proscription of Section 8(e). We believe, however, that the language quoted above from the House Report 741 as to the insertion of a disclaimer proviso was to ensure that the Senate Bill would not be misinterpreted so as to invalidate agreements which granted immunity against discipline to employees who refused to enter upon the premises of an employer other than their own where such employer is engaged in a primary labor dispute.

Sections of the Act should be interpreted, so far as possible, in harmony with each other so as to effectuate the total statutory scheme. In view of the legislative concern that certain so-called secondary activities were not to be proscribed, we conclude that a "picket line" clause, whose effect may be to cause a cessation of business between two employers, is nevertheless valid under Section 8(e) insofar as it is in conformity with the proviso to Section 8(b). Stated otherwise, a contract clause which grants immunity to individual employees from disciplinary action for their failure to cross a picket line would be valid under Section 8(e) if it were limited (a) to protected activities engaged in by employees against their own employer and (b) to activities against another employer who has been struck by his own employees, where the strike has been ratified or approved by their representative whom the employer is required to recognize under the Act.

Clearly, Section 1 of the Agreements involved here is not so limited and is therefore invalid under Section 8(e).[11] Thus, Section 1 would prevent an employer from disciplining his employees who refuse to cross picket lines at another employer's place of business, which may be established by a union not the majority representative, or from disciplining his employees who refuse to enter upon any property involved in a labor dispute, even though such dispute has not resulted in a strike. The effect of denying to an employer his privilege of replacing employees who refuse to carry out their assigned duties, where the refusal is not protected by Section 13 or the proviso to Section 8(b), is to require the employer to agree to cease or to refrain from handling the products of, or otherwise dealing with the employer whose products or services are under the union's ban.

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[11] The Board has been cautioned against interpreting as valid under Section 8 (e), agreements which can be so construed only through additions to or deletions from the actual language. *Employing Lithographers of Greater Miami v. N. L. R. B., supra.*

The Respondents' argument that the picket line clauses cannot be reasonably interpreted as requiring the transportation employer to cease or refrain from transporting the products of another employer, is necessarily based on the supposition that Respondent has no responsibility for what its members do. This argument is based on the assumption that the language of Section 1 (as well as the remaining sections of Article 9) constitute the entire express agreement of the parties and that there is no further "implied" agreement. These suppositions and arguments have been disposed of by the Trial Examiner, whose reasoning we have adopted above.

3. The introductory paragraph of Article 9, Section 2, and its first operative paragraph, referred to herein as (a), read as follows:

> Section 2, Struck Goods.
> Recognizing that many individual employees covered by this contract may have personal convictions against aiding the adversary of other workers, and recognizing the propriety of individual determination by an individual workman as to whether he shall perform work, labor or service which he deems contrary to his best interests, the parties recognize and agree that:
>
> (a) It shall not be a violation of this Agreement and it shall not be a cause for discharge or disciplinary action if any employee refuses to perform any service, which, but for the existence of a controversy between a Labor Union and any other person (whether party to this Agreement or not), would be performed by the employees of such person.

The Trial Examiner found, in view of the preamble to Section 2 which emphasizes the individual employee's right to self-determination, that the apparent purpose and reach of paragraph (a) was to preserve the right of sec-

ondary employees to refuse to handle products or to perform services "farmed out" to their employer by a struck employer where such "farming out" during and because of a labor dispute at the plant of the struck employer makes the secondary employer his "ally." So construed, he found that paragraph (a) embodies nothing more than the struck work-ally doctrine which the Board and Congress have sanctioned and which Congress intended to preserve. We believe that in at least one important respect Section 2(a) exceeds the permissible limits of the "struck-work" doctrine. We confine our discussion to one facet of this doctrine, namely, the situation arising when one employer knowingly does work by *arrangement* with a struck employer which would otherwise be done by the striking employees of that employer.[12] Unions have been found not to have violated Section 8(b)(4)(B) when, in an extension of a primary dispute with one employer, they have exerted pressure on another employer who knowingly does work by arrangement with the primary employer which, but for the dispute, would be done by the primary employees. Section 2(a) may ligitimately apply and be enforced in many situations in which the Board would have found no Section 8(b)(4)(B) violation on the ground that the union's secondary pressure is merely incidental to its primary activities. Section 2(a), however, overlooks an essential requirement of the ally doctrine, namely, that the struck work must be transferred to a secondary employer *through an arrangement with the primary employer*. As the paragraph now reads, the Respondents here could demand exoneration of their members, employed by a secondary employer, if they refused to perform services which would customarily not be performed by their

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[12] See *N. L. R. B. v. Business Machines, etc. Conference Board, Local 459*, 228 F. 2d 553 (C. A. 2); *Shopmens Local Union No. 501 (Oliver White Company, Inc.)*, 120 NLRB 856; and *International Die Sinkers Conference (General Metals Corporation)*, 120 NLRB 1227.

employer but where the performance of such services is *not* the subject of an arrangement between the primary and secondary employers. Stated more concretely, the Board has found a violation of Section 8(b)(4)(B) when employees of one carrier were induced to refuse to perform services or to handle goods assigned to that carrier by the producer of the goods who was unable to have them handled by another carrier whom he had previously used, because such carrier had been struck.[13] Because of the absence of any *arrangement* between the struck and the secondary employers, the work previously performed by the struck employer may not be interfered with even though the secondary employees are performing a service which, but for the dispute, would customarily be performed by the employees of the struck employer.

4. Section 2 (b) provides generally that sanctions will not be imposed upon employees who voluntarily choose not to handle goods or equipment involved in a labor controversy. It is to be construed, according to the Respondents, together with Section 2 (c) which provides in effect that the contracting employer will continue its business relationship with a struck employer by any method which it deems appropriate or proper but which does not require the use of employees who exercise their individual rights under the agreement of refusing to perform their normal duties. Section 2, paragraphs (b) and (c) are set out below:

> (b) Likewise, it shall not be a violation of this Agreement and it shall not be a cause for discharge or disciplinary action if any employee refuses to handle any goods or equipment transported, interchanged, handled or used by any carrier or other person, whether a party to this Agreement or not, at

[13] *United Marine Division of the National Maritime Union (D. M. Picton & Co., Inc.)*, 131 NLRB 603.

any of whose terminals or places of business there is a controversy between such carrier, or person, or its employees on the one hand and a Labor Union on the other hand; and such rights may be exercised where such goods or equipment are being transported, handled or used by the originating, interchanging or succeeding carriers or persons, whether parties to this Agreement or not.

(c) The Employer agrees that it will not cease or refrain from handling, using, transporting, or otherwise dealing in any of the products of any other Employer or cease doing business with any other person, or fail in any obligation imposed by the Motor Carriers' Act or other applicable law, as a result of individual employees exercising their rights under this Agreement or under law, but the Employer shall, notwithstanding any other provision in this Agreement, when necessary, handle, use, transport, or otherwise deal in such products and continue doing such business by use of other employees (including management representatives), other carriers, or by any other method it deems appropriate or proper.

The Respondents argue that these paragraphs, read separately or in conjunction, are not violative of Section 8 (e) because only the individual rights of individual employees to refuse to handle goods or equipment originating from strike-bound premises are protected, while the contracting employer agrees that it will continue its previous business relationship with the struck employer. The Respondents argue that these contractual provisions differ fundamentally from the "trade shop" clause found to be unlawful in *Amalgamated Lithographers (Miami Post Co.)*, 130 NLRB 968. The "trade shop" clause in that case admittedly imposed another type of sanction, that of reopening the contract and its possible termination, in the

event an employer requested individual employees to handle nonunion goods. The Board has, however, also held that immunity from discipline for individual employees may itself be an implementation of an objective to require employees not to handle struck goods or equipment. In the companion *Amalgamated Lithographers* case, 130 NLRB 985, the Board found that the "refusal to handle" clause in that Agreement violated Section 8 (e) and said at page 988:

> When contracting parties have agreed that if an employer requests an employee to handle struck or non-union work . . . and the employer agrees that he will not discharge or discipline an employee who refuses to handle such work, the ordinary remedy available against a disobedient employee, the conclusion is inescapable and we find, that the parties in substance have "impliedly" agreed that the employer will not handle such struck or non-union work.[14]

We have previously noted that the *Rockaway News* case stands for the proposition that an employer may by contract waive his right to discipline employees for their refusal to cross a legitimate picket line at a struck employer's premises. The waiver of these rights by an employer is for the benefit of individual employees; it does not confer a corresponding right on a union to insist that its policy against handling struck goods be embodied in the bargaining agreement. What the Respondents sought in Section 2 (b) and (c) was the effectuation of its policy against handling struck goods or equipment. The means, direct or indirect, by which this end is to be accomplished, is tainted by the illegality of its object. The more extensive analysis of the Trial Examiner as to the intention of Section 2 (b) and (c) is, in our opinion, wholly correct

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[14] See also to the same effect, *Amalgamated Lithographers of America*, 137 NLRB No. 179.

and we hereby adopt it. We agree with him that these provisions constitute an agreement that the employers will cease or refrain from handling, using, transporting, or otherwise dealing in any of the products of any other employer, or will cease doing business with any other person where there is a controversy between such other employer or person or their employees on the one hand, and a labor union on the other hand.[15]

5. Article 29 (a) of the Local Cartage Agreement and Article 47 (a) of the Over-the-Road Agreement, read as follows:

> The Employer agrees to refrain from using the services of any person who does not observe the wages, hours and conditions of employment established by labor unions having jurisdiction over the type of services performed.

The Respondents contend that the subcontracting provisions have for their purpose the preservation of jobs of employees in the contract unit. We find no merit in this argument since the cited paragraph dictates to the Employer those persons with whom he shall be permitted to do business, rather than obliging him to refrain from contracting out work previously performed by employees in the bargaining unit. The Board has recently struck down as a violation of Section 8 (e) a clause which pro-

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[15] In addition to the case relied on by the Trial Examiner, *Chauffeurs, etc., Local Union No. 135 (Irvin J. Cooper)*, 101 NLRB 1284, the Board has subsequently held that a union's disclaimer of an intent to seek an object illegal under Section 8 (b) (4) is to be construed in the light of what it does. See *International Mailers Union No. 6 ITU (The Publishers Association of New York City)*, 136 NLRB No. 19; *Local 1066 International Longshoremens Association (Wiggin Terminals, Inc.)*, 137 NLRB No. 3; and *Bakery Salesmens Local Union No. 227 (Associat Groceries, Incorporated)*, 137 NLRB No. 102. It requires or one additional step to find that a "cease doing business" object under Section 8 (b) (4) (B) is the same object under Section 8 (e), even though it is cloaked in words rather than acted out.

vided that in subcontracting out work, the employer shall give preference to shops either having a contract with or approved by a particular union.[16] The Board pointed out there that the subcontracting clause in issue in that case was more than a restriction on subcontracting for the preservation of jobs and job rights for employees inasmuch as it limited the persons with whom the employer could do business. Indeed, the subcontracting clauses in this case are even more restrictive since their prohibition against subcontracting is absolute, whereas in the *St. Louis Trimmers* case, cited above, the union sought only preferential treatment for those employers with whom it had contracts.[17]

ORDER.

Upon the entire record in this case and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondents, Truckdrivers Union Local No. 143, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and Central States Drivers Council, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, their officers, agents, representatives, successors and assigns, shall:

1. Cease and desist from:

(a) Maintaining, giving effect to, or enforcing Article 9, Sections 1 and 2, and Article 47 (a) of the Over-the-Road Motor Freight Agreement, and Article 9, Sections

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[16] *District No. 9, International Association of Machinists (Greater St. Louis Automotive Trimmers, etc.)*, 134 NLRB 1354, enfd. ....F. 2d ... (C. A. D. C.), decided Nov. 15, 1962.

[17] See also *Automotive, etc. Union Local 618*, 134 NLRB 1363 and *Highway Truck Drivers and Helpers Local 107 (E. A. Gallagher and Sons)*, 131 NLRB 925, enfd. 302 F. 2d 897 (C. A. D. C.)

1 and 2 and Article 29 (a) of the Local Cartage Agreement, to the extent found unlawful herein.

(b) Entering into, actively maintaining, giving effect to, or enforcing any other contract or agreement, express or implied, whereby any employer within the territorial jurisdiction of the Central States Drivers Council ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting, or otherwise dealing in any of the products of any other employer or from doing business with any other person.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Post at Respondents' business offices, and meeting halls copies of the notice attached hereto marked "Appendix".[18] Copies of said notice, to be furnished by the Regional Director for the Ninth Region, shall, after being duly signed by official representatives of the Respondents, be posted by the Respondents immediately upon receipt thereof and be maintained by them for 60 consecutive days thereafter, in conspicuous places, including all places where notices to its members are customarily posted. Reasonable steps shall be taken by Respondents to insure that said notices are not altered, defaced, or covered by any other material.

(b) Furnish to the Regional Director for the Ninth Region signed copies of the aforementioned notice for posting by employers who are party to either the Over-the-Road Motor Freight or the Local Cartage Agreements, if the Employers agree, in places where notices to employees are customarily posted. Copies of said notice, to be furnished by the Regional Director, shall, after being

[18] In the event that this Order is enforced by a decree of a United States Court of Appeals, the notice shall be amended by substituting for the words "Pursuant to a Decision and Order," the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order."

signed by Respondents, as indicated, be forthwith returned to the Regional Director for disposition by him.

(c) Notify the Regional Director for the Ninth Region, in writing, within 10 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D. C., Feb. 26, 1963.

.....
Frank W. McCulloch, Chairman,
.....
Philip Ray Rodgers, Member,
.....
Boyd Leedom, Member,
.....
John H. Fanning, Member,
.....
Gerald A. Brown, Member,
(Seal) National Labor Relations Board.

Appendix.

NOTICE.

To All Our Members and to All Employees of Employers Who Are Parties to Either the Central States Area Local Cartage or the Central States Area Over-the-Road Motor Freight Agreements.

Pursuant to

A Decision and Order

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby give notice that:

We Will Not maintain, give effect to, or enforce Article 9, Sections 1 and 2, and Article 47 (a) of the Over-the-Road Motor Freight Agreement, and Article 9, Sections 1 and 2 and Article 29 (a) of the

Local Cartage Agreement, to the extent found unlawful in our Decision and Order.

We Will Not enter into, actively maintain, give effect to, or enforce any other contract or agreement, express or implied, whereby any employer within the territorial jurisdiction of the Central States Drivers Council ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting, or otherwise dealing in any of the products of any other employer, or from doing business with any other person.

Truck Drivers Union Local 413, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

(Labor Organization.)

Dated ..... By .....
(Representative) (Title)

Central States Drivers Council, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

(Labor Organization.)

..... By .....
(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

Employees may communicate directly with the Board's Regional Office, Transit Bldg., 4th & Vine Sts., Cincinnati, Ohio, Tel. No. DUnbar 1-1420, if they have any question concerning this notice or compliance with its provisions.

United States of America

Before the National Labor Relations Board
Division of Trial Examiners,
Washington, D. C.

Case Nos. 9-CE-5-1-2.

Truck Drivers Union Local No. 413, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and Central States Drivers Council, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,

and

The Patton Warehouse, Inc.,

and

Arkansas Best Freight System, The Cleveland, Columbus and Cincinnati Trucking Co., C and D Motor Delivery, Inc., Dixie Ohio Express, Haeckl's Motor Freight, Huey Motor Express, Inc., W. L. Mead, Inc., Consolidated Freightways, Reinhardt Transfer Co., Suburban Motor Freight, Inc., The White Transportation Co.,

Parties to Central States Area Local Cartage Agreement,

and

Alpha Lines, Inc., Arkansas Best Freight System, Cleveland, Columbus & Cincinnati Highway, Inc., C and D Motor Delivery Co., Motor Freight Corp., Haeckl's Motor Freight, W. L. Mead, Inc., Consolidated Freightways, Suburban Motor Freight, Reinhardt Transfer Co., The White Transportation Co.,

Parties to Central States Area Over-the-Road Motor Freight Agreement, and Ohio Rider.

Case No. 9-CC-286.

Truck Drivers Union Local No. 413, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,

and

The Patton Warehouse, Inc.,

H. David Camp, Esq., and Jack B. Baker, Esq., for the General Counsel.

Goldberg, Previant and Uelmen, by David E. Uelmen, Esq., of Milwaukee, Wis., and
Robert C. Knee, Sr., and Robert C. Knee, Jr.. Esqs., of Dayton, Ohio, appearing for Respondent Unions.

Before: Eugene F. Frey, Trial Examiner.

Intermediate Report.

Statement of the Case.

This case, in which all parties were represented and participated by counsel or other representatives, was heard before the undersigned Trial Examiner in Columbus, Ohio, on August 22, 1961, on a consolidated complaint issued June 27, 1961, by the General Counsel of the National Labor Relations Board, and an answer duly filed by the Respondents, Truck Drivers Local Union 413, IBT, and Central States Drivers Council, IBT,[1] which denied the commission of the unfair labor practices alleged in the complaint and raised one constitutional defense. The case was presented by the parties entirely on a stipulated set of facts. All parties waived oral argument. General

[1] In this report, Truck Drivers Local Union 413 IBT, will be called the Local, Central States Drivers Council, IBT, will be called the Council, and "IBT" will refer to International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

Counsel and Respondents have filed briefs which the Trial Examiner has carefully considered.

On August 14, 1961, the parties executed a settlement agreement, approved by the Regional Director for the Ninth Region on August 15, 1961, which disposed of the issues raised by the pleadings in Case No. 9-CC-286. The agreement provided that, on its approval, Case No. 9-CC-286 should be severed from Case No. 9-CE-5-1-2, and the complaint in the prior case withdrawn. In accordance with that agreement, which is in evidence herein, the Trial Examiner granted the motion of General Counsel to sever Case No. 9-CC-286 and withdraw the complaint therein. Hence, the basic issues litigated in the remaining Case No. 9-CE-5-1-2 are as follows:

(1) Whether certain provisions of collective-bargaining agreements executed by Respondents with certain employers named in the caption, and others, effective February 1, 1961, amount to "entering into" illegal "hot cargo" agreements within the meaning and proscription of Section 8 (e) of the National Labor Relations Act, 61 Stat. 136 (herein called the Act), which was added to the Act by Section 704 (b), Title VII of the Labor-Management Reporting and Disclosure Act of 1959, P. L. 86-257, 86th Congress.

(2) Whether Section 8 (e) of the Act is unconstitutional.

Upon the pleadings, stipulated facts, and the entire record in the case, I make the following:

Findings of Fact.

I. The business of the Employers.

The Employers named in the caption and others who are employer members of associations named in the two

agreements described below, are each engaged in the business of interstate transportation of freight by motor vehicle in the Central States Area,[2] and during the past year each has received in excess of $50,000 gross revenue from such interstate operations. In the aggregate, all employers who are parties to said agreements receive annually gross revenue in excess of $100,000,000 from such operations. Respondents admit, and I find on these facts, that the Employers are and have been engaged in commerce within the meaning of Section 2 (6) and (7) of the Act.

II. The labor organizations involved.

The Local and the Council are labor organizations within the meaning of Section 2 (5) of the Act.

III. The unfair labor practices.

On various dates since March 1, 1961, the Employers named in the caption as "parties to Central States Area Local Cartage Agreement," and other employers, individually or as members of employer associations operating within the territorial jurisdiction of the Local, entered into a collective-bargaining agreement with Respondents as the collective bargaining representative of their employees, entitled "Central States Area Local Cartage Agreement" (herein called Local Cartage Agreement).

On various dates since March 1, 1961, the Employers named in the caption as "parties to the Central States Area Over-the-Road Agreement," and other employers, individually or as members of employer associations operating within the territorial jurisdiction of the Local, entered into a collective-bargaining agreement with Re-

[2] The Central States Area is defined in the agreements as "Michigan, Ohio, Indiana, Illinois, Wisconsin, Minnesota, Iowa, Missouri, North Dakota, South Dakota, Nebraska, Kansas, Kentucky, and Huntington, and Wheeling, West Virginia, and operations into and out of all contiguous territory."

spondents as the collective bargaining representatives of their employees, entitled "Central States Area Over-the-Road Motor Freight Agreement with Ohio Rider" (herein called the Over-the-Road Agreement).

Each agreement was effective as of February 1, 1961, and remains in effect until January 31, 1964, unless sooner terminated as provided therein.

At all times since February 1, 1961, Respondents have required the employer parties to these agreements to maintain and give effect to Article 9 entitled "Protection of Rights," which is identical in each agreement, and to Article 29 (a) entitled "Sub-contracting," of the Local Cartage Agreement, and an identical provision in Article 47 (a), entitled "Sub-contracting," of the Over-the-Road Agreement. The common Article 9 reads as follows:

Article 9—Protection of Rights.

Section 1, Picket Line.

It shall be a violation of this Agreement and it shall not be cause for discharge or disciplinary action in the event an employee refuses to enter upon any property involved in a labor dispute or refuses to go through or work behind any picket line, including the picket line of Unions party to this Agreement and including picket lines at the Employer's place or places of business.

Section 2, Struck Goods.

Recognizing that many individual employees covered by this contract may have personal convictions against aiding the adversary of other workers, and recognizing the propriety of individual determination by an individual workman as to whether he shall perform work, labor or service which he deems contrary to his best interests, the parties recognize and agree that:

(a) It shall not be a violation of this Agreement and it shall not be a cause for discharge or disciplinary action if any employee refuses to perform any service, which, but for the existence of a controversy between a Labor Union and any other person (whether party to this Agreement or not), would be performed by the employees of such person.

(b) Likewise, it shall not be a violation of this Agreement and it shall not be a cause for discharge or disciplinary action if any employee refuses to handle any goods or equipment transported, interchanged, handled or used by any carrier or other person, whether a party to this Agreement or not, at any of whose terminals or places of business there is a controversy between such carrier, or person, or its employees on the one hand and a Labor Union on the other hand; and such rights may be exercised where such goods or equipment are being transported, handled or used by the originating, interchanging or succeeding carriers or persons, whether parties to this Agreement or not.

(c) The Employer agrees that it will not cease or refrain from handling, using, transporting, or otherwise dealing in any of the products of any other Employer or cease doing business with any other person, or fail in any obligation imposed by the Motor Carriers' Act or other applicable law, as a result of individual employees exercising their rights under this Agreement or under law, but the Employer shall, notwithstanding any other provision in this Agreement, when necessary, handle, use, transport, or otherwise deal in such products and continue doing such business by use of other employees (including management representatives), other carriers, or by any other method it deems appropriate or proper.

Section 3, Grievances.

Within five (5) working days of filing grievance claiming violation of this Article 9, the parties to this Agreement shall proceed to the final step of the Grievance Procedure (Article 8, Sec. 1(c)), without taking any intermediate steps, any other provisions of this Agreement to the contrary notwithstanding.[3]

Article 29 of the Local Cartage Agreement reads as follows:

Article 29—Sub-contracting.

(a) The Employer agrees to refrain from using the services of any person who does not observe the wages, hours and conditions of employment established by labor unions having jurisdiction over the type of services performed.

General Counsel contends mainly, that Respondents' entering into, maintenance and enforcement of these "hot cargo" provisions have violated Section 8(e) of the Act which provides as follows:

(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unen-

[3] For ease of reference, I have marked the last 3 paragraphs of Section 2 with the submarkings (a), (b), and (c), and those paragraphs will be referred to hereafter as follows: "Paragraph 2 (a)" or the "refusal of service" clause, "paragraph 2 (b)" or the "refusal to handle" clause, and "paragraph 2 (c)" or the "continued business" clause.

forcible and void: *Provided,* That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further,* That for the purposes of this subsection (e) and section 8 (b) (4) (B) the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: Provided further, That nothing in this Act shall prohibit the enforcement of any agreement which is within the foregoing exception.

A. Contentions of the parties and concluding findings.

1. The constitutional issue.

The constitutional issue raised by Respondents can be disposed of at the outset. They claim that Section 8 (e) of the Act violates the Fifth Amendment to the Constitution of the United States because the provisos in the Section quoted above, which exempt bargaining agreements between labor organizations and employers in the construction and apparel and clothing industries, create unreasonable, irrational and discriminatory distinctions, and deprive Respondents of the due process of the law. In their brief, Respondents state specifically that they consider Section 8 (e) as unconstitutional *per se* and "as

applied". I do not express any judgment on this issue because it is well settled, as Respondents admit, that the Board, as an administrative agency created by the Congress, and the Trial Examiner, cannot rule on the constitutionality of any portion of the Act, as amended, but must leave such questions for the courts. I must therefore assume that all parts of the Act as amended are constitutional. *Bluefield Produce and Provision Company*, 117 NLRB 1660, 1663; *Amalgamated Lithographers of America, etc.*, 130 NLRB No. 102, at page 10.

2. The scope of the clauses.

Addressing themselves to the wording of the quoted clauses, Respondents present several technical arguments to show that they fall outside the scope of Section 8 (e). They say that the provisions, whether considered individually or collectively, do not constitute an "express" agreement or contract proscribed by the Act. But they admit that the contracts are express bilateral undertakings of the carriers and Respondents which fall within Section 8 (e), and argue therefrom that the issue here does not require a decision whether the documents involve "implied" contracts or agreements. However, they admit that interpretation of the language of an "express" agreement may be required to determine whether it falls within the class of documents proscribed by Section 8 (e). The Board has applied a broad rule of interpretation in determining whether specific contract clauses fall within the statute. In *Amalgamated Lithographers of America, et al. (San Francisco case)*, 130 NLRB No. 102, the Board noted that Section 8 (e) banned "express or implied" agreements, and held that, in construing clauses, an "implied" agreement within the wording of the statute could be implied from circumstances, general language or the conduct of the parties where the intention of the parties is not stated in explicit and direct words, and that Con-

gress was not concerned with simply outlawing word formulae in enacting Section 8 (e). And see the Board's additional remarks on this point in the *Miami Post Company case, infra,* quoted at length at page 13 hereafter.

Respondents argue that since Section 8 (e) refers only to "products of any other employer", and does not in terms ban agreements to cease or refrain from performing "any services", which terms are used in Section 8 (b) (4) dealing with secondary boycotts, the Board must presume that Congress did not intend Section 8 (e) to reach contracts involving "services". The argument is specious and must fall for several reasons. Where Section 8 (e) bans contracts to cease or refrain from "*handling . . . transporting . . .* or otherwise dealing in any of the products of another employer", it clearly refers to and includes the business of common carriers, which is the performance of services to other employers by transportation (which includes handling) of their products. At this late date in our transportation industry, it seems hardly questionable that the transportation and handling of products of business concerns is a "service" to them and the public in general, and that the rendition of such services is the primary function and business of common carriers. The legislative history of Section 8 (e) makes it clear that one of the basic objectives of the Congress was to reach and ban the so-called "hot cargo" agreements which the Teamsters Union had procured from common carriers, under which the carriers agreed not to handle or transport, or require their employees to handle or transport, products of other employers with whom that union had disputes, and which that union had used to implement its pressures on such "unfair" employers.[4] In introducing the Landrum-Griffin bill (HR

[4] See Vol. II, *Legislative History of the Labor Management Reporting and Disclosure Act of 1959*, U. S. Government Printing Office (1959), at pages 1161, 1162, 1197, 1242, 1258, 1259, 1273, 1428, 1432.

8400), and comparing its "hot cargo" ban with similar provisions in other bills before the Congress, Representative Griffin noted that those bills banned "contracts whereby the carrier agrees to refrain from transporting certain products or to provide services to some employer."[5] Finally, it appears that the Teamsters Union, with which respondents are affiliated, in arguing against the proposed "hot cargo" and "secondary boycott" provisions before the McClellan subcommittee of the House Committee on Education and Labor, itself considered the handling of transportation of goods by common carriers as synonymous with performance of a "service".[6]

Respondents also contend that Section 8 (e) does not cover labor agreements relating to "services" which operate only prospectively, arguing from the use of the word "cease" in the statutory phrase "*cease* doing business with any other person" (emphasis supplied) that this denotes only the cessation of existing or continuing activity, not future activity, and that this phrase is significantly narrower in scope than the earlier proscription of the Section 8 (e) against agreements to "cease or refrain from handling . . . products of any other employer." It also claims that "any other employer" includes a far smaller class of entities than "any other person". These technical arguments must also be rejected, as they place undue emphasis on specific words out of context and ignore the basic rule that the scope and reach of Section 8 (e) must be gathered from its contents considered as a whole in the light of the purpose of Congress as shown in the legislative history, and the overriding purpose of the Act itself. Viewed in this fashion, it is clear that Section 8 (e) in terms and in purpose reaches not only agreements whereby an em-

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[5] 105 *Cong. Rec.* 13092, II *Legis. Hist.* 1523.

[6] II *Legis. History* 1493.

ployer contracts (1) to "cease and refrain" from "handling . . . or transporting . . . products of any other employer", as conduct in which he is presently engaged, and (2) "agrees to cease and refrain" from such work and services for other employers, which contemplates future cessation of such activities when they occur, but beyond that (3) it covers agreements of a much broader class, which require him to "cease doing business with any other person", which includes not only employers, but other persons or business entities with which he has been doing business. This is clear from the fact that the Section voids and makes unenforceable "such an agreement" in "any contract or agreement entered into heretofore or hereafter." Thus it reaches existing and continuing conduct under existing agreements, as well as similar conduct which may arise under future contracts or agreements.

Examining Section 2, "Struck Goods" of the contracts in the light of the statutory terms, I am satisfied and find all of its operative paragraphs fall within the scope and meaning of Section 8 (e), because Section 2 (a) specifically deals with a refusal to perform "any service", Section 2 (b) covers a refusal "to handle any goods or equipment transported, interchanged, handled or used by any carrier or other person, . . . and Section 2 (c) plainly uses (though in negative form) the exact words and phrases of Section 8 (e).

3. The picket line clause.

Section 1, the "picket line" clause, allows employees with impunity to refuse to enter "any property involved in a labor dispute", and to refuse to cross or work behind "any picket line", including (1) those of unions which are parties to the above Agreements, and (2) those at the employer's place of business. Since picket lines by

employees at their own employer's place of business normally constitute primary activity which is protected by Section 13 of the Act, I agree with Respondent that the clause is lawful to the extent that it allows employees to refuse to enter their own employer's premises during a labor dispute with it or cross a picket line lawfully established there.

To support the legality of the balance of the provision, Respondents argue that refusal of transportation employees to cross a picket line has always been considered a legitimate primary activity. However, the cases cited by them, beginning with *Int. Rice Milling Co. v. N. L. R. B.*, 341 U. S. 665, 671-673, make it clear only that, in the enactment of Section 8 (b) (4) of the Taft-Hartley Act, and the 1959 modifications of that Section, Congress did not intend to restrict the traditional right of unions and their members to engage in primary strikes and other concerted primary activities and, in the course of such activity, to try to induce individual employees of neutral employers approaching the picket line at premises of the struck employer not to cross the picket line or enter the plant. See also *Local 761, etc. v. N. L. R. B.*, 366 U. S. 667, 673, where the Supreme Court held that "picketing which induces secondary employees to respect a picket line is not the equivalent of picketing which has an object of inducing those employees to engage in concerted conduct against their employer in order to force him to refuse to deal with the struck employer", thus recognizing the distinction between legitimate primary activity of striking employees which has an incidental effect on individual secondary employees *at the place of the primary activity*, and illegal persuasion to concerted activity by the latter which has as its direct target the secondary, neutral employer, with an object of forcing of that employer to "cease doing business with any other person", and in fact has that result. *Accord, Local*

No. 175 v. N. L. R. B., 48 LRRM 2598 (C. A. D. C.).[7] However, while employees of neutral employers may respond to inducements from primary pickets and not cross the picket line, thereby allying themselves with the primary activity, Respondents ignore the fact that such conduct exposes them to discipline, including discharge, by their own, neutral employer, if he still insists that they cross the picket line in ordinary performance of their duties. Though they may have acted with the understandable motive of sympathetic action to help employees of the struck employer, their refusal to perform the work for which they were hired in direct disregard of their own employer's orders, is unprotected activity for which they can be discharged. *Auto Parts Co.*, 107 NLRB 242; *Redwing Carriers, Inc.*, 130 NLRB No. 113. It is obviously this possible discipline of secondary employees which Respondents eliminated when they procured the insertion of the "Picket Line" clause in their 1961 contracts. By so doing, they retained for their members employed by the Employers the right with impunity to refuse to cross picket lines at or enter the premises of any struck employer, and thereby cause a complete cessation *pro tanto* of the normal operations of their employer. In practical effect, the Employers thereby agreed that they would cease doing business in normal fashion with struck employers, if and when their employees decide to recognize labor disputes and picket lines at the

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[7] In *Milwaukee Plywood Co.*, 126 NLRB 650, the Board dismissed a complaint charging violation of Section 8 (b) (4) (A), holding that advice from a Teamsters local not engaged in an existing strike conducted by another local, to its members that the picket line should be observed, was not a violation of Section 8 (b) (4) (A), because such advice, given when solicited by its members, "was not substantially different from the impact of the picket line itself or responses elicited from the pickets at the struck plant." The Board thus equated the outside union's advice to members (presumably employees of neutral employers) with legal picket line activity.

premises of such employers. Therefore, in its scope and practical effect, the "picket line" clause comes squarely within the interdiction of that portion of Section 8 (e) which prohibits the entry into and enforcement of any agreement whereby an employer agrees to "cease doing business with any other person".

Respondents argue further, however, that Congress intended to except "picket line" clauses from the operation of Section 8 (e), relying on a remark of Senator Kennedy, manager of the Senate joint conferees, to the effect that "we have protected the right of employees of secondary employers, in the case of a primary strike, to refuse to cross a primary picket line."[8] This contention requires careful consideration because of the efforts of Congress to preserve employees' rights of primary picketing and other primary activities, while at the same time closing certain loopholes in the secondary boycott provisions of the Taft-Hartley Act. Senator Kennedy made the above remark to the Senate on September 2, 1959, the day he submitted the joint conference report to it, as part of an informal preliminary explanation of the report. During debate the next day, he explained to the Senate that its conferees had insisted that any legislation should secure "*The right to engage in primary strikes and primary picketing even though the employees of other employers refused to cross the picket line.* The fact of the matter is that there is some question under the Landrum-Griffin bill whether employees of another employer could have properly refused *not* to cross a picket line in a primary strike. That has been clarified in the conference report." (Emphasis supplied.)[9] The two remarks are not consistent in that they denote different objectives: the former indicates a desire to protect a "refusal" right of *secondary em-*

[8] II *Legis. History* 1389.

[9] II *Legis. History* 1431, 1432.

ployees, while the latter indicates the conferees were concerned with protecting the legality of primary picketing activity, *despite* certain conduct of secondary employees. The true import of both remarks becomes clear from an examination of the legislative history of the 1959 Amendments. While HR 8342 and S. 1555 were being considered by the respective Houses of Congress, labor organizations strongly opposed Section 707 of S. 1555 (same as Section 8 (e) but without provisos) because it was broad enough to compel truckdrivers and other employees to act as strikebreakers by crossing primary picket lines. The House committee sought to allay this fear by putting new "hot cargo agreement" bans in HR 8342 as separate violations by employers under Section 8 (a) and by labor organizations under Section 8 (b) of the Act; but in the 8 (b) prohibition it inserted a proviso that—

> nothing in this paragraph shall be construed (A) to require any employee to enter upon the premises of an employer (other than his own employer) where such employer is engaged in a primary labor dispute, or (B) to invalidate a collective bargaining agreement which provides that such refusal shall not be cause for the discharge of such employee.[10]

The committee report explained that while the proviso was in the amendment covering the union unfair labor practice, "its substance is equally applicable to the employer's contractual undertaking," and observed that "the proviso is limited to primary activities." The committee also said its amendments clarified the distinction between primary activities and secondary boycotts. In explaining "primary activities," the committee noted that under existing law the Act did not require a truckdriver to cross a primary picket line, and that pickets might request him

[10] Sec. 705 (a) (2) of HR 8342 as reported, I *Legis. History* 775, 756.

not to enter a strikebound plant, but it also recognized existing law that "the truckdriver's employer would have the legal right to discharge him, or the employer could agree that he would not require the driver to enter the strikebound plant."[11] It is clear that the above-quoted proviso in Section 8 (b) would make sure that a driver's refusal to cross a picket line, and an employer's contractual recognition and safeguarding of such conduct by giving up his own right to discharge the employee for such action, would not be considered a secondary boycott. Some committee members also claimed the "disclaimer" proviso was designed to make it clear that the "hot cargo" ban did not "impinge in any way on existing law concerning the crossing, or not crossing, of primary picket lines by employees."[12]

Proponents of stronger legislation pointed out in both houses that the "disclaimer" proviso still permitted the Teamsters and other unions to put pressure on employers with whom they had disputes by embroiling neutral employers in the disputes, through causing them to refuse to give the primary employers service, or by ordering their employees not to perform their regular services to the "unfair" employers.[13] When the Landrum-Griffin bill (HR 8400) was introduced, on July 27, it contained (1) the "hot cargo" ban of S. 1555, but broadened to include all employers and all unions without limitation, and (2) in amending the secondary boycott provisions of the Act, it continued the existing proviso of Section 8 (b) (4) of the Taft-Hartley Act which excepted from the secondary boycott violations "a refusal by any person to enter upon the premises of any employer (other than his own employer) if the employees of such employer are engaged

[11] H. Report No. 741, July 30, 1959, I *Legis. History* 779, 780.

[12] H. Rep. No. 741, I *Legis. History* 838.

[13] I *Legis. History* 838, II *Legis. History* 1325, 1499.

in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act," and (3) it did not contain the "disclaimer" or "picket line" proviso in either its Section 8 (b) (4) or 8 (e) provisions.[14] Labor organizations and proponents of HR 8342 claimed the Landrum-Griffin provisions would compel employees to cross picket lines and become strikebreakers, and would make it illegal for primary pickets to request other employees to respect their picket lines.[15] In answer, both Houses were advised of the view that the broad "hot cargo" bans in both HR 8400 and S. 1555 did not affect a secondary employee's right to refuse to go through a primary picket line, and that HR 8400 specifically continued the protection of such refusal existing in the Taft-Hartley Act, where the primary strike was lawful and approved. It was also noted that the Teamsters Union was really seeking to legalize "full and unrestrained leeway" to refuse to cross any picket line, including one set up by "wildcat strikers" or minority employees whose acts did not have approval of a majority of employees in a unit.[16]

After the Landrum-Griffin bill was passed by the House on August 13, 1959, strong arguments were made in both houses that its amendments of Section 8 (b) (4) as well as its new "hot cargo" bans, were so broad as to make illegal otherwise legitimate primary picketing activities in the course of which pickets might induce truckers to refuse to cross the picket line, and would thus cast doubt on the legality of all lawful primary picket lines which secondary employees refused to cross at the request of the pickets. The fear apparently was, that the success of

[14] Sections 705 (a) and (b) (1) of HR 8400, I *Legis. History* 682, 683.

[15] II *Legis. History* 1619, 1620, 1652, 1656, 1689.

[16] II *Legis. History* 1619, 1620.

primary picketing in this respect might be construed as dragging secondary employers into a dispute if their employees by their own action respected the picket lines, thus converting a primary dispute into a secondary boycott.[17] There were persuasive arguments that the bill must be clarified to protect the right of self-respecting union members to refuse to cross "good faith" or "legal" picket lines, to assure that agreements specifically protecting that right be validated, and to provide that the amendments dealing with secondary boycotts should not be construed to prohibit "primary strikes and picketing permitted by existing law."[18]

After both Houses met to reconcile their differences, their conferees reported out on September 2 and 3 the amended bill which later became the Labor Management Reporting and Disclosure Act of 1959, with these pertinent changes and omissions:

(1) In Section 8(b)(4), they did not reinstate the proviso to Section 8(b)(4) in the original HR 8342 which would have validated agreements allowing secondary employees to respect any picket lines, but continued only the limited proviso of the Taft-Hartley Act which excepted *from the secondary—boycott ban* the limited right of secondary employees to refuse to enter premises of a struck employer where the strike was legal and ratified by a union which the employer was required by the Act to recognize.

(2) In enacting Section 8(e), they limited its operation only with respect to agreements among closely allied employers in the garment industry and among certain employers in the construction industry. In writing the exception for the garment industry, they made it apply

[17] II *Legis. History* 1707, 1708.

[18] II *Legis. History* 1313-1315, 1383, 1384.

specifically as a limitation or exception to the operation of both Section 8 (e) and Section 8 (b) (4). As to the construction industry, the limitation related only to the operation of Section 8(e). There was no repetition in Section 8(e) of, or reference therein to, the existing limited proviso in Section 8(b)(4) mentioned in the preceding paragraph.

The Conference Report on S. 1555 shows that the conferees treated, amended and compromised on Section 8 (b) (4) and the new "hot cargo" agreement provisions separately. As to Section 8 (b) (4), besides continuing the present proviso noted above, the conferees stated they added a proviso "that nothing contained in clause (B) of this paragraph (4) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing," in order to make it clear that the changes in Section 8(b)(4) "do not overrule or qualify the present rules of law permitting picketing at the site of a primary labor dispute." As to hot cargo agreements, they noted the addition of three specific provisos to the broad wording of Section 8(e) of HR 8400, stating that the proviso regarding the construction industry was limited in scope and related only to Section 8(e) and did not affect the law regarding certain agreements about work to be done at a construction site, as developed under Section 8(b)(4).[19] The Senate Committee analysis of the new bill confirms the view that, in writing limitations, Section 8(b)(4) and the new Section 8(e) were considered separately.[20] Individual members of the joint conference committee also emphasized to the Congress that the conference had agreed on clarification of Section 8(b)(4), only to assure that the "right to engage in lawful primary strike and picketing"

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[19] H. Rep. No. 1147, on S. 1555, I *Legis. History* 934, at pages 942-944.

[20] I *Legis. History* 942, at page 966.

would be protected and not considered a secondary boycott, "even though the employees of other employers refused to cross the picket line;" there was no mention of "primary picketing" or the necessity or desire to protect it by contract terms, in reporting the scope of specific limitations on the prohibitions of Section 8(e).[21]

I conclude from this legislative history, and the provisions of both Section 8(b)(4) and Section 8(e) as they now stand, that the Congress intended (1) to continue to protect the right of primary picketers to persuade other workers to respect their picket lines, and to assure that their success in this would not transform the primary picket line into an illegal secondary boycott, but (2) to leave unchanged the existing law that secondary employees who yielded to such persuasion and refused to cross primary picket lines in violation of their own duties and employers' orders, while not violating the Act in so doing, would still run the risk of discipline or discharge in thus refusing to carry out such orders, and (3) to insure that the right of secondary employers to impose such discipline or penalty in efforts to continue their business with the primary, struck employer could not be swept away by "picket line" clauses which could have the effect of curtailing or causing complete cessation of the business of the secondary employer with the struck employer.

4. The "struck goods" clauses.

Considering Section 2(a), the "refusal of service" clause by itself, I am inclined to agree with Respondents that, in the light of the preamble to Section 2 which emphasizes the individual employee's right of self-determination, the apparent purpose and reach of the clause is to preserve the right of secondary employees to refuse to handle work

[21] II *Legis. History* 1437, 1712, 1720, 1721, 1722, 1857.

or perform services "farmed out" to their employer by a struck employer, in situations where the "farming out" of such work only during and because of a labor dispute at the plant of the struck employer makes the secondary employer an "ally" of the struck employer. This embodies nothing more than the "farmed-out-struck work-ally" doctrine which the Board and courts have sanctioned and which the Congress clearly intended to preserve.[22] As thus construed, paragraph 2 (a) appears to fall outside the scope of Section 8(e) and to be lawful.[23]

Section 2(b), the "refusal to handle" clause, gives contractual immunity from discipline to employees who refuse to handle any goods or equipment transported or handled in any fashion by "*any* carrier or other person" whose place of business is involved in a labor dispute with *any* labor organization; and this includes such goods or equipment while traveling in a chain of any interchanging or succeeding carriers or persons. When the "picket line" and "refusal to handle" clauses are considered together, they amount to an agreement by the employer that his employees may with impunity refuse to transport or otherwise handle or perform services with respect to goods coming from or destined to premises of any struck carrier or other struck employer, and are the type of "hot cargo" clauses traditionally included in contracts by locals of the Teamsters Union, and other labor organizations, and which were considered by the Board and the courts in the *Sand*

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[22] *General Metals Corporation*, 120 NLRB 1227, 1228, 1229; *Miami Post Company*, 130 NLRB No. 107; II Legis. History 942, 1007, 1079, 1373, 1383, 1384, 1386, 1389, 1431, 1432, 1681, 1720, 1721, 1810, 1822.

[23] This paragraph does not go so far as to immunize employees' refusal to perform services *customarily* done by their employer for the struck employer, which distinguishes it from one held illegal by the Board in *Amalgamated Lithographers of America et als.* (*San Francisco case*), 130 NLRB No. 102, at page 6.

Door and Plywood Co. case,[24] *The Humko Co., Inc.*, 121 N. L. R. B. 1414, *American Feed Company*, 129 N. L. R. B. No. 35, and 133 N. L. R. B. No. 23, *American Iron and Machine Works Co.*, 115 N. L. R. B. 800, affirmed in part *sub nom. General Drivers, etc., Local 886 v. N. L. R. B.*, 247 F. 2d 71 (C. A. D. C.) See also II *Legis. History* 1386, 1777, 1799. Furthermore, insofar as the employer renders himself powerless by these provisions to compel his employees to handle goods or perform services necessary in the ordinary course of his business dealings with a struck employer or other person, they amount to an implied agreement by the employer that he will not handle such "struck" work, or in other words, that he will cease doing business with the struck employer, and in that respect they fall within the interdiction of Section 8(e). In *Amalgamated Lithographers of America, et al. (San Francisco)*, *supra*, the Board recently said: (130 N. L. R. B. No. 102, at page 5).

> Section 8 (e) bans "express or implied" "hot cargo" agreements. The term "implied" is used in law as contrasted with "express" when the "intention in regard to the subject matters is not manifested by explicit and direct words, but is gathered by implication or necessary deduction from the circumstances, the general language, or the conduct of the parties." When contracting parties have agreed that if an employer requests an employee to handle struck or non-union work, the Union shall have the right to terminate the contract, an ordinary remedy for a material breach of agreement by the other party to a contract, *and the employer agrees that he will not discharge or discipline an employee who refuses to handle such work, the ordinary remedy available against a disobedient*

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[24] *Local 1976, United Brotherhood of Carpenters, etc. (Sand Door and Plywood Co.)*, 113 NLRB 1210, affirmed 357 U. S. 93, 95, 97, 101.

> *employee,* the conclusion is inescapable, and we find, that the parties in substance have "impliedly" agreed that the employer will not handle such struck or non-union work. . . . Congress was not concerned with simply outlawing word formulae in Section 8 (e). In the light of the hard facts, the circumstance that the word "agree" is not used, or that a statement is made that no contract express or implied is intended, is meaningless. The statute cannot be avoided by so easy a means. (Emphasis supplied.)

In the companion *Miami Post Company* case, *supra,* the Board, in construing similar clauses, made the same statements and added (130 NLRB No. 107, at pages 11, 12): "Moreover, Congress was intent upon outlawing 'hot cargo' clauses no matter how disguised. Probably no language can be explicit enough to reach in advance every possible subterfuge of resourceful parties. Nevertheless we believe that in using the term 'implied' in Section 8 (e) Congress meant to reach every device which, fairly considered, is tantamount to an agreement that the contracting employer will not handle the products of another employer or cease doing business with another person." It should also be noted that, contrary to some of Respondents' arguments herein, the Teamsters Union when presenting arguments to the Congress against the "hot cargo" provisions of the Kennedy bill (S. 1555), recognized that clauses of this type could reasonably be construed as preventing a carrier from doing business with a struck or "unfair" employer. In this connection, it said—(II Legis. History 1493):

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> . . . The core of any hot cargo or picket line provision is the agreement that no employee shall be discharged or disciplined for refusing to go through a picket line or refusing to handle unfair goods as a matter of in-

dividual choice. However, this ordinary picket line clause, which, as I have said, prohibits the disciplining of employees of a common carrier, certainly may be construed to be an implied agreement that the carrier will not do business with an employer who is being picketed, or will not handle or transport goods of another employer, if such goods have been declared unfair. For if a common carrier gives up its right to compel its employees to go through a picket line, or compel its employers to handle or transport unfair goods, and if it cannot otherwise discharge its obligations, then certainly it has agreed not to do business with another employer.

This same result would flow if a common carrier grants permission to its employees not to cross a picket line. Because of the giving of such permission, the carrier's failure again to discharge the employees may well be considered an implied agreement on the carrier's part not to do business with the struck employer.

Even if the employees of a common carrier were not sent to or through a picket line, such employees would still be required to break strikes by handling and transporting the unfair goods at points away from the picket line and away from the strike-bound plant. Thus nonunion cartage companies, the trucks of the struck employer, driven by scabs or supervisors, will either transport goods from the plant to the common carrier's dock or to an agreed upon meeting place or pick up goods at the dock of union common carriers to take into the plant.

Today, the union truckdriver and dockworker can refuse to assist in these strikebreaking tactics by refusing to handle such goods away from the strike-bound plant.

Under this law, of course, it is clear that the law even more directly prohibits contracts under which

common carriers would agree not to transport goods to or from strike-bound plants or agree not to transport unfair goods or agree not to interline with non-union truck companies.

* * * * * * * *

The Teamsters' analysis applies equally to the "picket line" clause and further supports the conclusion that that clause falls within the scope of Section 8 (e).

On the above analysis and considerations, I conclude and find that both the "picket line" and "refusal to handle" clauses of the "struck goods" provisions are within the scope and interdiction of Section 8 (e).

Respondent's main contention is that these provisions differ from the "hot cargo" clauses heretofore considered by the Board and the courts, because they are removed from the scope of Section 8 (e) by Section 2 (c), the "continued business" clause, which expressly *requires* the contracting employer to *continue doing business* with strike-bound employers, when his own employees have exercised their "refusal" rights under Section 1 and Section 2 (b), "by use of other employees (including management representatives), other carriers, or by any other method it deems appropriate or proper." They argue that, since this provision expressly provides that the contracting employer "will continue its normal business relationship and affirmatively waives any other contract clauses which might interfere with the continuation of such relationships," it precludes any penalty upon such employer for continuing business with a struck firm, but leaves him "completely free to utilize non-objecting employees, supervisors, or anyone else for that matter" to carry on such business. Respondents conclude that the clause thus expressly negates any agreement, which might otherwise be implied from the preceding clauses, by the employer to "cease doing business with any other person" as prohibited by

Section 8 (e) and precludes any finding that such agreement exists. They reason further that Section 8 (e) was intended to prohibit only the type of "hot cargo" agreements considered by the Supreme Court in the *Sand Door and Plywood* case, *supra,* and that at most Congress intended to outlaw "hot cargo" agreements which prohibited union members, "and which failed to allow supervisors, to handle 'hot cargo,' thereby requiring the employer to cease or refrain from handling such goods." Stated another way, Respondents argue that the clauses here can be found to violate Section 8 (e) only if the clear obligation of Section 2 (c) to *continue* business is disregarded, and if one presumes at the outset that all employees of the secondary employer will exercise their "refusal" rights under the preceding paragraphs, thus barring him from continuance of his business. It is claimed that the Board cannot indulge in these presumptions.

I consider these arguments without merit for several reasons. In the first place, the stipulated record shows that Respondents have at all times required the contracting employers to maintain and give effect to the clauses in question, and specifically that during a labor dispute between Respondent Local and Patton Warehouse, Inc., the contracting employers have handled freight destined for or coming from that concern by the use of supervisors and management representatives. In that respect, it is true none of the employers have "ceased doing business" with that concern, in the sense of "complete cessation." However, the fact that the secondary employers dealt with Patton during the dispute by using supervisors and management representatives, warrants the inference that none of their regular drivers or workforce handled freight going to or coming from that concern, and that in so doing they were exercising the rights given them by Sections 1 and 2 (b) of the contracts. This is a legitimate inference which the Board can draw from stipulated facts,

particularly the enforcement of Section 2 (c) which required the employers to use "other employees including management representatives" to carry on business with a struck employer "as a result of individual employees exercising their rights under this Agreement." In addition, we cannot ignore the fact of industrial life which has been recognized by the Board, the courts and the Congress, that labor organizations, including the Teamsters Union and its affiliated locals, and their members have traditionally followed the policy of refusing to handle or work on products of nonunion or "unfair" employers, variously called "hot cargo" or "unfair" or "hot" goods. It is a legitimate inference from this circumstance that the employees of the employers here followed that traditional policy in the Patton dispute, for that very policy was recognized as their "right" by the above clauses.[25] This disposes of the "presumption" argument of the Respondents.

The crucial issue is raised by Respondents' own contention that the employer is required by Section 2 (c) to "continue its normal business relationships" with a struck employer. Section 2 (c) clearly contemplates that, when secondary employees refuse, in the normal course of their work, to handle or service the goods or products of a struck employer, the secondary employer must continue to do business with the latter with whatever other employees, carriers, or means that he can procure, *but without the use of his regular work force.* Does the continuance of dealings with the struck employer in that fashion amount to a continuance of a "normal business relationship," so as to preclude any finding that the secondary employer has "ceased to do business with" the struck employer, within the meaning of Section 8 (e)?

[25] It is immaterial whether the union members acted individually or collectively, or without specific order from Respondents. See *Local 135, IBT (Capital Paper Company, et al.)*, 117 NLRB 635, at pages 644, 645, and cases there cited.

The basic purpose of the Act from its inception has been the promotion, maintenance and protection of the "free flow of commerce." The stated purpose and policy of the Taft-Hartley Act was to "promote the full flow of commerce" by statutory measures designed to "avoid or substantially minimize . . . industrial strife which interferes with the normal flow of commerce . . ." Section 1 (b) of P. L. 101—80th Congress, 61 Stat. 136, etc. The 1959 Amendments were enacted in part to eliminate or prevent improper practices by labor organizations and employers which "distort and defeat the policies of the Labor Management Relations Act, 1947, as amended, . . . and have the tendency or necessary effect of burdening or obstructing commerce by (1) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (2) occurring in the current of commerce; (3) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods into or from the channels of commerce . . ." (Section 2 (c), P. L. 86-257, 73 Stat. 519). The employers here, as common carriers, are "instrumentalities of commerce," and the transportation industry of which they are a part is clearly an "industry affecting commerce." I have found nothing in the legislative history of the 1959 Act which specifically indicates that Congress debated the meaning of the words "doing business" or ascribed to them any special or limited meaning. Hence, I must assume that Congress used them in the ordinary sense in which they are used in everyday business practice, as connoting a mercantile operation or occupation in which a person, firm or corporation is habitually engaged, especially for livelihood or gain. In the case of a common carrier they connote the ordinary operation of his transportation business with drivers and other employees in such number and of such type and calibre as he deems necessary in his own best judgment for the most efficient conduct of his business for gain. It is well known in the transportation industry,

and the Board has recognized, that the number of drivers and other related personnel in appropriate transportation units is normally far higher than the number of supervisory or management personnel.[26] Hence, if a common carrier is compelled by the refusal of his normal work force to handle "hot cargo," to use some of his relatively small force of supervisors and management personnel for the handling of "hot" freight destined for or coming from a struck employer, it is obvious that this is not his "normal" manner of doing business, and it may well be that he cannot long continue dealing with the struck employer in that fashion with normal efficiency, or at a profit. Withdrawal of supervisors or management officials from their regular duties to operate trucks and handle freight would obviously interfere with the normal, efficient supervision of the regular employees (who would presumably continue their normal duties in servicing of other employers) and the proper administration of other phases of the business. If the secondary employer used "other employees" to service the struck employer, he would have to hire other workers to handle their regular duties, or provide for their performance in some other manner, in either event with disruption of normal operations and probable additional cost. He would also lose profits if he farmed out his commitments with the struck employer to "other carriers," who could not be expected to handle the work without receiving all or most of the service charges.[27] Hence, no matter what expedient allowed by the "continued business" clause the carrier

[26] *New York City Omnibus Corporation,* 104 NLRB 579, 584.

[27] Certainly he could not use other common carriers who were parties to the 1961 agreements with Respondents, for the same clauses would operate to prevent such carriers from doing business with the struck employer. If he resorted to nonunion truckers, who would be considered as "scab" labor or "substandard" employers by Respondents and their members, it is problematical how long they would be permitted to cross a union picket line without retaliation by the pickets and their sympathizers.

used to carry on business with the struck employer, the normal, efficient and profitable operation of his business would be disrupted to that extent. It cannot be assumed that he would long continue to do business with the struck employer under such handicaps. Hence, I must conclude that the availability of alternate but subnormal methods of "doing business" set forth in Section 2 (c) does not preclude a finding that the operation of Sections 1 and 2 (b) and (c) of the 1961 contracts would cause a common carrier to "cease doing business" in normal fashion with a struck employer. The Board reached the same conclusion on a similar contention in *Chauffeurs, etc., Local Union No. 135 (Irving J. Cooper, et al.)*, 101 NLRB 1284, in which it found a violation of Section 8 (b) (4) (A) of the Taft-Hartley Act where the union, in the course of a dispute with certain suppliers, had induced and encouraged employees of common carriers to refuse to handle freight at premises of their employers, with an object of forcing the carriers to cease doing business with the suppliers. In reaching its decision, the Board adopted the report of the Trial Examiner which stated the problem and his conclusion as follows—(101 NLRB at pp. 1292, 1293):

> . . . According to the Union, at most what it sought to accomplish was a change in the method of Supplier-Carrier operations at the Carriers' premises. The Union predicates this argument on the premises that the phrase "to cease doing business" means to cut off all avenues of operations between primary and secondary employer and that this required cessation is not met where the Union provides the Carriers an alternative method of doing business with the Suppliers, which it claims it did here.
>
> As neutral parties to a dispute between the Union and the Suppliers, the Carriers are entitled, within the meaning of Section 8 (b) (4) (A) of the Act, to be free from any interference in the manner they

> choose to do business with the suppliers, where a purpose of such interference is to cause the Carriers to cease doing business with the Suppliers. I am unaware of any warrant in the language of the Act, its legislative history, or its policy which might justify otherwise unlawful interference merely because the Union offers an alternative method of operations on the Union's own terms. To hold otherwise would effectively remove this secondary boycott provision from the Act. Nor is it relevant, in my opinion, that the alternative be equally convenient to the Carriers, which in this case it was not. (The record amply supports the charging parties' claim that "the conditions which the Union seeks to impose upon motor carriers for the privilege of doing business with the nonunion supply firms are obviously burdensome conditions which render it impractical in some cases and impossible in others for the motor carriers to do business with such supplier firms.")
>
> I find, in any event, that the Union's purpose was not only to breach Carrier-Supplier operation at the Carrier's premises, but that, by preventing such operation, it also sought to attain the ultimate object of completely disrupting business relations between Carriers and nonunion Suppliers. I conclude, therefore, that the phrase "to cease doing business" does not require a complete cessation in all respects and under all circumstances. But even if a complete rupture in Carrier-Supplier relations be required as an object, I conclude that the Union had such an object in this case.

I think that these considerations and the conclusions of the Board thereon are equally applicable to the clauses here,[28] and are dispositive of the main contentions of Respondents.

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[28] This is the same "realistic" reasoning which the Board followed in holding a "trade shop" clause illegal in *Miami Post Com-*

The claim that a finding of illegality of Section 2 would require a complete disregard of the initial wording of Section 2 (c) which specifically negates and bars any agreement to "cease doing business with any other person" is likewise without merit, in the light of the decision in the *Miami Post Company* case, *supra*, where the Board, in stating the scope of "implied" agreements under Section 8 (e), said (130 NLRB No. 107, at pages 10, 11)—

> . . . No particular words are necessary to establish an implied agreement. *Neither will an express disclaimer necessarily negative the existence of such an agreement.* It is all the circumstances which determine whether, notwithstanding the attempted disguise of language, an agreement has in fact been made. (Emphasis supplied.)

I conclude and find that Section 2 (c), despite the "disclaimer" wording relied on by Respondents, in its scope and potential operation does not take Sections 1 and 2(b) of the contracts outside the scope of Section 8 (e) of the Act, but that the three provisions considered in relation to each other clearly fall within the prohibitions of that Section.

I also conclude that Section 3 of Article 9, which requires the contracting parties to resort to the contract grievance procedure for any alleged violations of Article 9, cannot operate to withdraw the Article from the interdiction of Section 8 (e), because Section 10 (a) of the Act requires that the Board's power to prevent any person

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pany, supra. While the clauses here do not contain a specific penalty (termination of contract for violation by the employer) as in the cited case, they contain a built-in detriment which can become a real loss tantamount to a penalty, i. e., an enforced continuance of dealings with a struck employer in a strained, subnormal manner without use of regular employees, which the employer can avoid only by a complete cessation of dealings with the struck employer. Hence, in practical operation, the clauses would have the same penalizing effect as that in the *Miami Post* case.

from engaging in any unfair labor practices affecting commerce "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise." Under this provision the Board has held with court approval that as a governmental agency it is not bound by agreements of private parties, and that it will act to protect public rights established and protected by the Act, even where private parties have resorted to contract procedures to dispose of issues arising under contracts.[29]

5. The "Sub-contracting" clause.

The "subcontracting" clause in the Agreements clearly provide that the employer will "refrain from using the services" of persons who do not operate under "union" conditions. I have already rejected the arguments that use of the words "refrain" and "services" in the "hot cargo" clauses considered above place them beyond the purview of Section 8 (e), and the same conclusion applies to this clause. Respondents argue that the purpose of the clause is to enable labor organizations to protect "union conditions" of their members from "ruinous competition of unorganized industries paying substandard wages" and to prevent the contracting employers from using the "threat of subcontracting the work to employers paying substandard wages" as an additional weapon in bargaining to depress wages and working conditions. Respondents thus recognize that this clause deals with and prevents subcontracting of work by employers to non-union or unorganized employers or other business concerns. Stated otherwise, the employers thereby agree to

[29] *Montgomery Ward & Company, Inc.*, 121 NLRB 1552, 1559 (footnote 14); *Monsanto Chemical Company*, 97 NLRB 517, 520, enfd. 205 F. 2d 763 (C. A. 8); *Geo. Myrmo & Sons*, 122 NLRB 256, 261 (footnote 11); *Local Union 929, United Brotherhood of Carpenters, etc.* (*The Mengel Company*), 120 NLRB 1756, 1766 (footnote 11).

limit their subcontracting of work or services in the course of their business to union-approved or—organized concerns, and to eliminate nonunion or unorganized firms from their business dealings, regardless of the effect such elimination may have upon their business. Respondents argue that the stated purpose of the clause must be equated with the recognized right of unionized employees to refuse to work on "farmed-out" or "struck" work in situations where the "ally" doctrine applies.

The legislative history of the 1959 Amendments indicates that these arguments, among others, were repeatedly presented to the Congress during the debates on the pending amendments, and were rejected by it when it enacted Section 8 (e), and that Congress intended by that Section to proscribe agreements which limited employers in their normal methods of business operation, including subcontracting, and thereby caused them to cease doing business with any other person, except as specifically exempted in the Section itself.

In the early House debates on HR 8342 the House was advised by labor organizations that its hot cargo clause prohibition would, in the transportation industry, strike a "mortal blow at the long-recognized right of unions to appeal directly to employers to assist the union in removing sweatshop conditions in an industry by *refusing to deal with unfair, antiunion employers.*" (Emphasis supplied.)[30] The Teamsters Union argued that the pending proposals would prevent unions from making agreements with common carriers that they would use only union-made truck parts and automobile supplies, or that the work done in their repair shops would not during the life of the Teamsters contract be subcontracted out to a nonunion shop.[31] Similar warnings were voiced by members

[30] II *Legis. History* 1770.

[31] II *Legis. History* 1493.

of the House opposing the bill. Thus, the House was well aware that HR 8342 struck at union practices of inducing employers by contract to refuse to do business with other employers considered by unions as antiunion, but only in one industry. To remove this limitation, among other things, HR 8400 (the Landrum-Griffin bill) was introduced on July 24, 1959. It contained in Section 705 (b) (1) the broad wording of present Section 8 (e) of the Act without any provisos or limitations. In the debate thereon, the House was clearly advised of the broad scope of 705 (b).[32] On August 13, 1959, the House substituted HR 8400 for HR 8342. The Senate Report on S. 1555 (the Kennedy bill) specifically noted the prevalence in union contracts, particularly those negotiated by the Teamsters Union, of clauses whereby the employer itself agreed not to handle goods, materials, or products classified by a union as "hot," "unfair" or "blacklisted." See Senate Report No. 187, page 79, 1 *Legis. History* 475. While HR 8400 and S. 1555 were being considered in joint conference, Congress was advised by Senator Kennedy and Representative Thompson of the wide difference in coverage between the hot cargo prohibitions in the bills.[33] The Senate conferees finally procured House acceptance of limitations of the prohibition in HR 8400 to exempt therefrom only contractual restrictions on subcontract arrangements in the garment industry, and hot cargo agreements in the construction industry.

In the Senate debates on the joint conference report, Senator Morse opposed its recommendations, emphasizing that Section 8 (e) prohibited any provisions in collective-bargaining contracts which imposed any conditions upon the employer doing business with another employer. He said that one far-reaching effect of the House provision

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[32] II *Legis. Hist.* 1543, 1549.

[33] II *Legis. Hist.* 1708.

was that "it would prevent a union from protecting the bargaining unit it represents by obtaining an agreement not to subcontract work normally performed by employees in the unit," and cited as other arrangements which would be banned "a manufacturing plant which agrees not to subcontract alteration or repair work," and "an agreement requiring employers to furnish union-made overalls and tools" (which would in effect prohibit them from purchasing such items from non-union subcontractors or suppliers).[34] The Landrum-Griffin bill, containing the present Section 8 (e), was adopted by the Senate on September 3, by the House on September 4, and was signed into law by the President on September 14, 1959. The fact that Congress mentioned contracting arrangements of certain types in only two industries in the exceptions it wrote into Section 8 (e), and imposed these limitations on its broad prohibitions only after long debate on those situations, indicates clearly that it did not intend that any other contracting or subcontracting arrangements in any other industry should be exempted from the Section.[35] I must also assume that, in not broadening the exceptions in Section 8 (e) beyond the wording of its provisos, after hearing the arguments about the broad restrictions of Section 8 (e) upon subcontracting, the Congress concluded that it was acting to balance and harmonize, to the extent it considered to be in the public interest, "the dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own."[36] I conclude that the "subcontracting" clauses of the 1961

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[34] II *Legis. Hist.* 1428, 1430.

[35] *Amalgamated Lithographers of America, etc.*, 130 NLRB No. 102, at page 6.

[36] *N. L. R. B. v. Denver Bldg. and Constr. Trades Council et als.*, 341 U. S. 675, 692.

contracts fall within the purview of Section 8 (e) of the Act.

The Board has recently held that contract provisions substantially similar to those in the 1961 contracts were proscribed by Section 8 (e). In *Pilgrim Furniture Company, Inc.*, 128 NLRB 910, the Board held that a contract clause whereby the "company agrees that after notice by the union it will not purchase materials from any company where a bona fide labor dispute exists to which the Carpenters Union is a party" was proscribed by Section 8 (e), and that a contract containing that clause did not bar an election. In *Calorator Manufacturing Corp.*, 129 NLRB 704, the Board made a similar ruling on a clause stating that "In the event that the Employer discontinues any of his manufacturing processes during the life of this Agreement and sublets this work to another firm, the Employer agrees that in the event the work will be performed by a firm under contract with an International Union, if available and comparable in quality."

Having found (1) that Sections 1 and 2 (b) and (c) and Section 3 of Article 9, and the "subcontracting" clauses, in the 1961 contracts fall within the purview of Section 8 (e), that (2) the legislative history of Section 8 (e) clearly indicates the intent of Congress that contract limitations of this type upon business operations of employers be proscribed, and that Respondents' actual enforcement of Sections 1 and 2 (b) and (c) of the contracts caused employers to "cease doing business with another person" within the meaning of Section 8 (e), I conclude and find that Respondents violated that Section by entering into and maintaining in effect the 1961 contracts containing the clauses aforesaid. *American Feed Company*, 133 NLRB No. 23.

IV. The remedy.

Having found that Respondents have violated Section 8 (e) of the Act by entering into contracts whereby the contracting employers agreed to cease or refrain from handling, using, transporting or otherwise dealing in products or freight of other employers or persons, and thus to cease doing business with such other employers or persons, I shall recommend that they cease and desist from maintaining in effect, implementing or renewing Article 9 (excepting Section 1 insofar as it relates to picketing at premises of the contracting employer, and the first operative paragraph of Section 2), of each of the 1961 Agreements described above and Article 29 (a) of the 1961 Local Cartage Agreement and Article 47 (a) of the 1961 Over-the-Road Motor Freight Agreement with Ohio Rider.

Since the texts of said Agreements and the whole record indicate that it was Respondents' intent to bind all like employers in a substantial area, I shall also recommend that Respondents cease and desist from entering into any contract or agreement, express or implied, with any of the employers who are parties to said Agreements or any other employer, whereby such employer agrees to cease or refrain from handling, using, transporting, or otherwise dealing in the products or freight of, or to cease doing business with, any other employer or person. *Local 294, International Brotherhood of Teamsters, etc. (Van Transport Lines, Inc.)*, 131 NLRB No. 42.

Upon the basis of the foregoing findings of fact, and on the entire record in the case, I make the following:

Conclusions of Law.

1. Respondent Local and Respondent Council are labor organizations within the meaning of the Act.

2. The Patton Warehouse, Inc., and the persons and corporations who are parties to the Agreements effective February 1, 1961, and described above, are employers

and persons engaged in commerce and in an industry affecting commerce within the meaning of Sections 2 (2), (6) and (7) and 8 (e) of the Act.

3. By entering into, maintaining, and giving effect to contracts with said employers whereby said employers agreed to cease or refrain from handling, using, transporting or otherwise dealing in the products or freight of, or cease doing business with, any other employer or person, Respondents have engaged in and are engaging in unfair labor practices within the meaning of Section 8 (e) of the Act.

4. Said unfair labor practices affect commerce within the meaning of the Act.

Recommended Order.

Upon the basis of the foregoing findings of fact and conclusions of law, and on the entire record in the case, and pursuant to Section 10 (c) of the Act, I hereby recommend that Truck Drivers Union Local No. 413, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and Central States Drivers Council, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and their respective officers, representatives, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Entering into, maintaining or giving any effect to any contracts, express or implied, with any of the employers who are parties to the Central States Area Local Cartage Agreement and the Central States Area Over-the-Road Motor Freight Agreement with Ohio Rider, both effective February 1, 1961, or any other employer, whereby such employer agrees to cease or refrain from handling, using, transporting, or otherwise dealing in the products or freight of, or to cease doing business with,

The Patton Warehouse, Inc., or any other employer or person.

(b) Maintaining in effect, implementing, enforcing, or renewing Article 9, entitled "Protection of Rights" (excepting Section 1 insofar as it relates to picketing at premises of the contracting employer, and the first operative paragraph of Section 2), and Article 29 (a), entitled "Sub-contracting," of said Central States Area Local Cartage Agreement, and Article 9, entitled "Protection of Rights" (with the exceptions aforesaid), and Article 47 (a) entitled "Sub-contracting," of said Central States Area Over-the-Road Motor Freight Agreement with Ohio Rider.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Post in conspicuous places in their offices, places of business and meeting halls in Chicago, Illinois, and Columbus, Ohio, and other places where notices to their members are customarily posted, copies of the notice attached hereto and marked "Appendix A."[37] Copies of said notice, to be furnished by the Regional Director for the Ninth Region, shall, after being duly signed by Respondents' authorized representatives, be posted by Respondents immediately upon receipt thereof, and be maintained by them for a period of 60 consecutive days thereafter in the places aforesaid. Reasonable steps shall be taken by Respondents to insure that said notices are not altered, defaced, or covered by any other material.

(b) Furnish to the Regional Director for the Ninth Region signed copies of the notice in "Appendix A," for

[37] If these Recommendations are adopted by the Board, the words "A Decision and Order" shall be substituted for the words "The Recommendations of a Trial Examiner" in the notice. If the Board's Order be enforced by a decree of a United States Court of Appeals, the words "A Decree of the United States Court of Appeals Enforcing an Order" shall be substituted for the words "A Decision and Order."

posting at the premises of The Patton Warehouse, Inc., if said employer is willing, and the premises of all other persons or establishments with whom The Patton Warehouse, Inc., has been doing business during 1961 and is now doing business, if said persons or establishments are willing, and at the premises of all employers who are parties to the Agreements described in paragraph 1 (a) of this Order, if said employers are willing. Such notices shall be posted by said employers immediately upon receipt thereof and be maintained by them for 60 consecutive days thereafter at places where notices to their employees are customarily posted.

(c) Notify the said Regional Director, in writing, within 20 days from the date of receipt of this report what steps Respondents have taken to comply herewith.[38]

Dated at Washington, D. C.

Eugene F. Frey,
Trial Examiner.

Appendix A.

Notice.

Pursuant to the Recommendations of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended by the Labor-Management Reporting and Disclosure Act of 1959, we hereby notify you that:

We Will Not enter into, maintain or give any effect to any contract, express or implied, with any of the Employers who are parties to our Central States Area Local Cartage Agreement, effective February 1, 1961, and our Central States Area Over-the-Road Motor Freight Agreement with Ohio Rider, effective Feb-

[38] If these Recommendations are adopted by the Board, this provision shall be modified to read: "Notify said Regional Director in writing within 10 days from the date of this Order what steps Respondents have taken to comply herewith."

ruary 1, 1961, or any other employer, whereby such employer agrees to cease or refrain from handling, using, transporting or otherwise dealing in the products or freight of, or to cease doing business with, The Patton Warehouse, Inc., or any other employer or person.

We Will Not maintain in effect, implement, enforce, or renew Article 9, entitled "Protection of Rights" (excepting Section 1 insofar as it relates to picketing at premises of the contracting employer, and the first operative paragraph of Section 2), and Article 29 (a), entitled "Sub-contracting," of said Central States Area Local Cartage Agreement, and Article 9, entitled "Protection of Rights" (with the exceptions aforesaid), and Article 47 (a) entitled "Sub-contracting", of said Central States Area Over-The-Road Motor Freight Agreement with Ohio River.

Truck Drivers Union Local No. 413, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,
(Labor Organization)

By .....
(Representative) (Title)

Dated .....

Central States Drivers Council, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,
(Labor Organization)

By .....
(Representative) (Title)

Dated .....

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

APPENDIX C.

United States of America.

Before the
National Labor Relations Board.

Case No. 10-CE-1.

Truck Drivers & Helpers Local Union No. 728, International Brotherhood of Teamsters, and Southern Conference of Teamsters, Affiliated With the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America,

and

Brown Transport Corp.,

and

Akers Motor Lines, Atlanta-Asheville Motor Express, Atlanta Motor Lines, Atlanta-New Orleans Motor Freight, Benton Rapid Express, Carolina Freight Carriers Corporation, Central Truck Lines, Jack Cole Company, Custom Cartage Company, Dance Freight Lines, Dixie Highway Express, Inc., Dixie-Ohio Express, Inc., Gordons Transports, Inc., Hennis Freight Lines, Inc., Hoover Motor Express, Huber & Huber Motor Express, Johnson Freight Lines Company, Johnson Motor Lines, Mason & Dixon Lines, McLean Trucking Company, Miller Motor Express, Murdock Freight Line, Northern Freight Lines, Parts Convoy Corporation, Pike Transfer Company, Pilot Freight Carriers, Inc., R. C. Motor Lines, R. C. A. Truck Lines, Roadway Express, Inc., Rutherford Freight Lines, Inc., Ryder Truck Lines, Inc., Ryder Truck Lines, Inc., of Tennessee, Terminal Transport Company, T. I. M. E., Inc., Transcon, Lines, Inc., Wilson Truck Company,

Parties to the Contract.

Decision and Order.

On August 25, 1961, Trial Examiner Arthur E. Reyman issued his Intermediate Report in the above-entitled proceeding, finding that the Respondents had engaged in and were engaging in certain unfair labor practices and recommending that they cease and desist therefrom and take certain affirmative action, as set forth in the Intermediate Report attached hereto. Thereafter, the Respondents, the General Counsel, several parties to the contract, and the Charging Party, filed exceptions to the Intermediate Report and supporting briefs. On December 20, 1961, the Board heard oral argument in Washington, D. C., in which all parties were given an opportunity to appear and participate.[1]

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and briefs, the oral argument, and the entire record in the case, and finds merit in the exceptions of the General Counsel, the Charging Party, and certain parties to the contract. Accordingly, the Board adopts only those findings, conclusions, and recommendations of the Trial Examiner which are consistent with this Decision and Order.

On January 24, 1961, the Respondents and the Southeastern Area Motor Carriers Labor Relations Association Negotiating Committee entered into separate memoranda of agreement covering over-the-road employees and local pickup and delivery drivers. On March 9, 1961, these memoranda were adopted by the parties as their final

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[1] Because of the similarity of the issues involved, this matter was consolidated for purposes of oral argument with *Truck Drivers Union Local No. 413 et al. (The Patton Warehouse, Inc.)*, 140 NLRB No. 136.

collective-bargaining agreements. The only significant changes for our purposes between the memoranda and the final agreements is that Section 4 of Article IX of the over-the-road memorandum and Section 4 of Article X in the local pickup and delivery memorandum were deleted from the final agreements. The effect of these deletions is discussed below.

The complaint alleged that the Protection of Rights articles of the two agreements, referred to herein for convenience as Article IX, constitutes a "hot cargo" agreement and that the act of entering into and maintaining this Article in effect is itself a violation of Section 8(e).

1. The Trial Examiner found the Respondents guilty of violations of Section 8(e), not because they had entered into or maintained the agreements, but only because Article IX had been implemented by certain activities of the Respondents, resulting in a refusal to handle the freight of Brown Transport Corporation after it had been struck for refusing to sign the memorandum of January 24. Our decision in *Mary Feifer, d/b/a American Feed Company*, 133 N. L. R. B. 214, confirms the correctness of the General Counsel's exceptions to this finding. We held there that the act of entering into, signing, executing, or making a contract, either express or implied, which is prohibited by Section 8(e), is sufficient to establish a violation of that Section without regard to whether there are any attempts to implement such contract.

2. Article IX, Sections 1 and 2 are, with certain insignificant changes in language, identical with Article IX in the companion case, *Truck Drivers Union Local No. 413 (The Patton Warehouse, Inc.)*, 140 N. L. R. B. No. 136. The Board found in that case that Article IX constituted a "hot cargo" agreement. It will serve no purpose here to repeat the reasons which prompted our conclusions in

Patton Warehouse. We find, for the reasons stated in that case, and to the extent found there, that Sections 1 and 2 of Article IX in issue here are violative of Section 8(e).

3. The preliminary memorandum of January 24, 1961, contained as an integral section, Article IX, Section 4, titled Hazardous Work. The Respondents contend that Section 4 is not in issue because it was omitted from the collective-bargaining agreements which were adopted in March 1961. However, since Section 4 was part of the memoranda of agreement which the parties considered binding on themselves prior to the execution of the final agreements some 6 weeks later, we find that Section 4 constituted for that period an agreement of the parties, and that its validity under Section 8(e) is therefore in issue here. Section 4, while in effect, read as follows:

> Section 4. Hazardous Work.
>
> In the event it should be finally determined, after appeal, if available and taken, by and tribunal of competent jurisdiction that employees covered by this Agreement may be required to make deliveries to, pickups from or enter upon the premises of any person who is involved in a labor dispute, the Employer shall provide the following additional benefits to such employees in view of the additional hazards, difficulties, and hardships of performing such duties:
>
> 1. An insurance policy which provides life insurance, hospital and medical benefits, and compensation for partial and permanent disabilities, all of which shall be no less than three (3) times similar benefits provided by applicable workmen's compensation laws. Where the Employer is not covered by such Workmen's Compensation Law, he shall voluntarily assume his obligations under the law, and, in addition, provide the above benefits.

2. Wages which are no less than three (3) times the rate of pay or earnings otherwise applicable for all services performed on the day or the entire tour of duty during the course of which the above-stated duties must be performed.

3. The Employer shall also, upon request of the Union or employee involved, provide adequate protection against possible injury to such employee or his family which may result from the performance of such duties.

4. If required to testify before any tribunal with regard to the matters referred to in this Article, the employee shall be reimbursed for lost wages.

The import of Section 4 is that if a tribunal of competent jurisdiction decides that employees may be required to handle goods at premises involved in a labor dispute, the Employer shall thereafter provide certain additional benefits and protection to its employees. It is a method for making it difficult, expensive, and unlikely for an employer signatory to the agreement to insist that his employees handle "hot cargo" goods or equipment. It is comparable in its effect, to Section 2(c) of Article IX which requires an employer to continue to do business with a struck employer and to handle his "hot cargo," but only by the use of strange and uneconomic means. An employer who is permitted by a "tribunal" to require his employees to handle "hot cargo," should be able to do so in his accustomed manner. To saddle him with new obligations if he wishes to comply with the law is to penalize him for his observance. Nor is this device more palatable or persuasive because it seems to be directed toward the protection of employees. Certainly, in those situations when the "hot cargo" which the employer is obligated to handle is under the ban of these Respondents

or of other affiliates of the Teamsters Union, it is they who are creating the unsafe conditions which the employees must endure, and it is they, not the employers, who can best assure the safety of the employees.

Section 4 is, in our opinion, designed to compel adherence by employers signatory to the agreement, to Sections 1 and 2 of Article IX without regard to their illegality, through economic coercion. In view of our holding that Sections 1 and 2 of Article IX exceed the limits of legality imposed by Section 8(e) of the Act, we regard Section 4 as an implementation of the Union's illegal object and therefore, is itself illegal.

Order.

Upon the entire record in this case and pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondents, Truckdrivers and Helpers Local Union No. 728, International Brotherhood of Teamsters and Southern Conference of Teamsters, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, its officers, agents, representatives, successors and assigns, shall:

1. Cease and desist from:

(a) Maintaining, giving effect to, or enforcing Article IX, Sections 1 and 2 of the Over-the-Road Agreement, Article X, Sections 1 and 2 of the Local Freight Agreement, Article IX, Section 4 of the Over-the-Road Memorandum of Agreement, and Article X, Section 4 of the Local Freight Memorandum of Agreement, to the extent found unlawful herein.

(b) Entering into, actively maintaining, giving effect to, or enforcing any other contract or agreement, express

or implied, whereby any employer within the territorial jurisdiction of the Southern Conference of Teamsters, ceases or refrains, or agrees to cease or refrain from handling, using, selling, transporting, or otherwise dealing in any of the products of any other employer, or from doing business with any other person.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Post at its business offices and meeting halls, copies of the notice attached hereto marked "Appendix."[2] Copies of said notice, to be furnished by the Regional Director for the Tenth Region, shall, after being duly signed by official representatives of the Respondents, be posted by the Respondents immediately upon receipt thereof, and be maintained by them for 60 consecutive days thereafter, in conspicuous places, including all places where notices to its members are customarily posted. Reasonable steps shall be taken by Respondents to insure that said notices are not altered, defaced, or covered by any other material.

(b) Furnish to the Regional Director for the Tenth Region signed copies of the aforementioned notice for posting by employers who are party to either the Over-the-Road or the Local Freight Agreements, if the employers agree, in places where notices to employees are customarily posted. Copies of said notice, to be furnished by the Regional Director shall, after being signed by Respondents, as indicated, be forthwith returned to the Regional Director for disposition by him.

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[2] In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "Pursuant to a Decision and Order" the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order."

(c) Notify the Regional Director for the Tenth Region, in writing, within 10 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D. C.

.....
Frank W. McCulloch, Chairman.

.....
Philip Ray Rogers, Member,

.....
Boyd Leedom, Member,

.....
John H. Fanning, Member,

.....
Gerald A. Brown, Member,

(Seal) National Labor Relations Board.

Appendix.

Notice

To All Our Members and to All Employees of Employers Who Are Parties to Either the Southern Conference Local Freight or the Southern Conference Over-the-Road Agreements

Pursuant to

A Decision and Order

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby give notice that:

We Will Not maintain, give effect to, or enforce Article IX, Sections 1 and 2 of the Over-the-Road Agreement, Article X, Sections 1 and 2 of the Local Freight Agreement, Article IX, Section 4 of the Over-the-Road Memorandum of Agreement, or Article X,

Section 4 of the Local Freight Memorandum of Agreement, to the extent found unlawful in our Decision and Order.

We Will Not enter into, actively maintain, give effect to, or enforce any other contract or agreement, expressed or implied, whereby any employer within the territorial jurisdiction of the Southern Conference of Teamsters ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting, or otherwise dealing in any of the products of any other employer, or from doing business with any other person.

Truckdrivers and Helpers Local Union No. 728, International Brotherhood of Teamsters
(Labor Organization)

Dated..... By.....
(Representative) (Title)

Southern Conference of Teamsters, affiliated with The International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,
(Labor Organization)

Dated..... By.....
(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Employees may communicate directly with the Board's Regional Office, 528 Peach Tree-Seventh Building, 50 Seventh Street, N. E., Atlanta 23, Georgia, Tel. No. TRinity 6-3311, Ex. 5357, if they have any question concerning this notice or compliance with its provisions.

United States of America

Before the National Labor Relations Board
Division of Trial Examiners,
Washington, D. C.

Case No. 10-CE-1.

Truck Drivers & Helpers Local Union No. 728, International Brotherhood of Teamsters, and Southern Conference of Teamsters, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America,

and

Brown Transport Corp.,

and

Akers Motor Lines, Atlanta-Asheville Motor Express, Atlanta Motor Lines, Atlanta-New Orleans Motor Freight, Benton Rapid Express, Carolina Freight Carriers Corporation, Central Truck Lines, Jack Cole Company, Custom Cartage Company, Dance Freight Lines, Dixie Highway Express, Inc., Dixie-Ohio Express, Inc., Gordons Transports, Inc., Hennis Freight Lines, Inc., Hoover Motor Express, Huber & Huber Motor Express, Johnson Freight Lines Company, Johnson Motor Lines, Mason & Dixon Lines, McLean Trucking Company, Miller Motor Express, Murdock Freight Line, Northern Freight Lines, Parts Convoy Corporation, Pike Transfer Company, Pilot Freight Carriers, Inc., R. C. Motor Lines, R. C. A. Truck Lines, Roadway Express, Inc., Rutherford Freight Lines, Inc., Ryder Truck Lines, Inc., Ryder Truck Lines, Inc. of Tennessee, Terminal Transport Company, T. I. M. E., Inc., Transcon Lines, Inc., Wilson Truck Company,

Parties to the Contract.

Gilbert Cohen and John H. Fenton, Esqs., of Washington, D. C., for the General Counsel.

Edwin Pearce and John Patton, Esqs., of Atlanta, Ga., for Local Union No. 728.

N. D. Wells, Jr., Esq., of Dallas, Tex., and David Previant, Esq., of Milwaukee, Wis., for Southern Conference of Teamsters.

Frank Constangy, M. A. Prowell, and Fred W. Elarbee, Jr.. Esqs., of Atlanta, Ga., for Brown Transport Corp.

Alexander E. Wilson, Jr., John E. Branch, and Robert T. Thompson, Esqs., of Atlanta, Ga., for Akers Motor Lines, Atlanta Motor Lines, Dance Freight Lines, Gordons Transports, Inc., Miller Motor Express, Murdock Freight Line, Parts Convoy Corporation, Ryder Truck Lines, Inc., Ryder Truck Lines, Inc., of Tennessee, and Wilson Truck Company, Parties to the Contract.

Robert H. Cowan, Esq., of Nashville, Tenn., for Huber & Huber Motor Express, Terminal Transport Company, Johnson Freight Lines Company, and R. C. Motor Lines, Parties to the Contract.

Jacob P. Billig, Esq., of Atlanta, Ga., for Pike Transfer Company, Party to the Contract.

Joseph H. Blackshear and John N. Crudup, Esqs., of Gainesville, Ga., for Northern Freight Lines, Party to the Contract.

Harold H. Clokey, Esq., of Atlanta, Ga., for Transcon Lines, Inc., Party to the Contract.

Before Arthur E. Reyman, Trial Examiner.

Intermediate Report and Recommended Order.

Statement of the Case.

This is a proceeding under Section 10 (b) of the National Labor Relations Act, as amended, 29 U. S. C. 151, *et seq.*, and concerns primarily an interpretation of Section 8 (e) of the Act, as amended (Landrum-Griffith amendments, 73 Stat. 519).

On February 9, 1961, Brown Transport Corp., filed a charge alleging an unfair labor practice under Section 8 (e) against Truck Drivers & Helpers Local Union No. 728, International Brotherhood of Teamsters, and the Southern Confefence of Teamsters, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Respondents herein. On February 24, 1961, Brown Transport Corp. filed an amended charge against the above-named labor organizations and included therein some 35 Parties to the Contract mentioned below and "other motor freight common carriers" saying that said labor organizations entered into and maintained in effect with the named carriers, contracts, and agreements which instigated and caused and under which such employer common carriers "ceased, refrained, and have continued to refuse and refrain," from handling, transporting, and dealing in the freight and products of Brown Transport Corp. in violation of Section 8 (e) of the Act.

On March 14, 1961, the General Counsel of the National Labor Relations Board, through the Regional Director for the Tenth Region, on behalf of the Board, issued a complaint and notice of hearing. Timely answers to the complaint were filed by Local Union No. 728 and the Southern Conference, and on behalf of carriers, named Parties to the Contract, including Akers Motor Lines, Atlanta Motor Lines, Central Truck Lines, Dance Freight

Lines, Gordons Transports, Inc., Huber & Huber Motor Express, Johnson Freight Lines Company, Miller Motor Express, Murdock Freight Lines, Northern Freight Lines, Parts Convoy Corporation, Pike Transfer Company, R. C. Motor Lines, Ryder Truck Lines, Inc., Ryder Truck Lines, Inc., of Tennessee, Terminal Transport Company, Transcon Lines, and Wilson Truck Company.

This case came on to be heard before the undersigned Trial Examiner, at Atlanta, Georgia, on May 2, 1961, and was concluded on May 8. Each party named above was represented by counsel, was afforded full opportunity to call witnesses, to examine and cross-examine, to present evidence, to make oral argument, and to file proposed findings of fact and conclusions of law.

In question here is a basic interpretation of Section 8 (e) as written into the Act by the Landrum-Griffith amendments.

Briefs have been filed by counsel for the General Counsel, the Charging Party (herein sometimes called Brown), Akers Motor Lines, Atlanta Motor Lines, Central Truck Lines, Dance Freight Lines, Gordons Transports, Inc., Johnson Motor Lines, Miller Motor Express, Murdock Freight Lines, Ryder Truck Lines, Inc., Ryder Truck Lines, Inc., of Tennessee, and Wilson Truck Company. The Southern Conference of Teamsters and Truck Drivers & Helpers Local Union No. 728, also briefed the case through counsel. Each brief has been carefully considered.

Proposed findings and conclusions have been submitted by several of the above-named parties.

On the basis of the whole record herein, and upon consideration of briefs and proposed findings and conclusions as submitted, and after hearing the witnesses, I make the following:

I. Findings of Fact.

(a) The business of Brown Transport Corp.

Brown Transport Corp., the Charging Party herein, during the times material hereto, was engaged and now is engaged in the transportation and handling of freight received from or to be delivered to consignors or consignees of freight by motor vehicle.

(b) The business of the parties to the contract, as described in the complaint.

Akers Motor Lines, Atlanta-Asheville Motor Express, Atlanta Motor Lines, Atlanta-New Orleans Motor Freight, Benton Rapid Express, Carolina Freight Carriers Corporation, Central Truck Lines, Jack Cole Company, Custom Cartage Company, Dance Freight Lines, Dixie Highway Express, Inc., Dixie-Ohio Express, Inc., Gordons Transports, Inc., Hennis Freight Lines, Inc., Hoover Motor Express, Huber & Huber Motor Express, Johnson Freight Lines Company, Johnson Motor Lines, Mason & Dixon Lines, McLean Trucking Company, Miller Motor Express, Murdock Freight Line, Northern Freight Lines, Parts Convoy Corporation, Pike Transfer Company, Pilot Freight Carriers, Inc., R. C. Motor Lines, R. C. A. Truck Lines, Roadway Express, Inc., Rutherford Freight Lines, Inc., Ryder Truck Lines, Inc., Ryder Truck Lines, Inc., of Tennessee, Terminal Transport Company, T. I. M. E., Inc., Transcon Lines, Inc., and Wilson Truck Company (herein called the Employers), are engaged as common carriers by motor vehicle in the interstate transportation of freight. During the past calendar year, which period is representative of all times material herein, each of the Employers received more than $50,000 from the interstate transportation of freight. The Employers are, and have been at all times material herein, engaged in commerce within the meaning of Section 2 (6) and (7) of the Act.

II. The labor organizations involved.

Respondents, Local Union No. 728 and the Southern Conference, are, and have been at all times material herein, labor organizations within the meaning of Section 2 (5) of the Act.

III. The unfair labor practices.

The facts herein are not greatly in dispute. As noted above, the case revolves around the proper construction of Section 8 (e), as applied to these facts. It seems expedient, at the outset, to say that on or about January 24, 1961,[1] the Respondent labor organizations and the Employers, through their representative, Southeast Areas Motor Carriers Labor Relations Associations Negotiating Committee, or directly, entered into a written memorandum of agreement, effective as of February 1, 1961, containing the following provisions:

> Article IX. Protection of Rights.
>
> Section 1. Picket Line.
>
> It shall not be a violation of this Agreement and it shall not be cause for discharge or disciplinary action in the event an employee refuses to enter upon any property involved in a labor dispute or refuses to go through or work behind any picket line, including the picket line of Unions party to this Agreement and including picket lines at the Employer's places of business.
>
> Section 2. Struck Goods.
>
> Recognizing that many individual employees covered by this contract may have personal convictions against aiding the adversary of other workers, and

[1] Unless otherwise noted all dates hereafter mentioned are for the year 1961.

recognizing the propriety of individual determination by an individual workman as to whether he shall perform work, labor or service which he deems contrary to his best interest, the parties recognize and agree that:

It shall not be a violation of this Agreement and it shall not be a cause for discharge or disciplinary action if any employee refuses to perform any service which, but for the existence of a controversy between a labor union and any other person (whether party to this Agreement or not), would be performed by the employees of such person.

Likewise, it shall not be a violation of this Agreement and it shall not be a cause for discharge or disciplinary action if any employee refuses to handle any goods or equipment transported, interchanged, handled or used by any carrier or other person, whether a party to this Agreement or not, at any of whose terminals or places of business there is a controversy between such carrier, or person, or its employees on the one hand and a labor union on the other hand; and such rights may be exercised where such goods or equipment are being transported, handled or used by the originating, interchanging or succeeding carriers or persons, whether parties to this agreement or not.

The Employer agrees that it will not cease or refrain from handling, using, transporting, or otherwise dealing in any of the products of any other employer or cease doing business with any other person, or fail in any obligation imposed by the Motor Carriers' Act or other applicable law, as a result of individual employees exercising their rights under this Agreement or under law, but the Employer shall, notwithstanding any other provision in this Agreement, when necessary, handle, use, trans-

port or otherwise deal in such products and continue doing such business by use of other employees (including management and representatives), other carriers, or by any other method it deems appropriate or proper.

Section 3.

Within five (5) working days of filing of grievance claiming violation of this Article IX, the parties to this Agreement shall proceed to the final step (Article VIII, Sections 1 (c) and 1 (d) of the Grievance Procedure), without taking any intermediate steps, any other provision of this Agreement to the contrary notwithstanding.

Section 4. Hazardous Work.

In the event it should be finally determined, after appeal, if available and taken, by any tribunal of competent jurisdiction that employees covered by this Agreement may be required to make deliveries to, pick-ups from or enter upon the premises of any person who is involved in a labor dispute, the Employer shall provide the following additional benefits to such employees in view of the additional hazards, difficulties, and hardships of performing such duties:

1. An insurance policy which provides life insurance, hospital and medical benefits, and compensation for partial and permanent disabilities, all of which shall be no less than three (3) times similar benefits provided by applicable workmen's compensation laws. Where the Employer is not covered by such Workmen's Compensation Law, he shall voluntarily assume his obligations under the law, and, in addition, provide the above benefits.

2. Wages which are no less than three (3) times the rate of pay or earnings otherwise applicable for

all services performed on the day or the entire tour of duty during the course of which the above-stated duties must be performed.

3. The Employer shall also, upon request of the Union of employee involved, provide adequate protection against possible injury to such employee or his family which may result from the performance of such duties.

4. If required to testify before any tribunal with regard to the matters referred to in this Article, the employee shall be reimbursed for lost wages.

Section 5. Sympathetic Action.

In the event of a labor dispute between any Employer or Union, party to this Agreement, during the course of which such Union engages in lawful economic activities which are not in violation of this Agreement, then any other affiliate of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America having an agreement with such Employer shall have the right to engage in lawful economic activity against such Employer in support of the Union which is party to this Agreement notwithstanding anything to the contrary in the Agreement between such Employer and such other affiliate.

The memorandum agreement of January 24 covered local freight and over-the-road operations of the carriers in their relation to the Respondents. On March 9 the Respondents and the Carriers entered into the Southern Conference Local Freight Forwarding, Pickup and Delivery Agreement and the Southeastern Area Over-the-Road Motor Freight Agreement, in which the "protection of rights" clauses in the memoranda of agreement were modified in some respects. The first three sections of the

clauses were retained; the fourth section was deleted, and the fifth and last section was transposed to another article. The "protection of rights" clauses in the modified local freight agreement and in the modified over-the-road agreement are contained in Articles XI and IX respectively, in the formal exhibits herein. The issue here concerns the "protection of rights" clauses.

The clauses mentioned above are practically identical as contained in the local freight pickup and over-the-road contracts. Article 9, Southern Conference Over-the-Road Motor Freight Agreement, for the period February 1, 1961, to January 31, 1964, as finally executed, provides under the protection of rights clause, Section 1:

> It shall not be a violation of this agreement and it shall not be cause for discharge or disciplinary action [etc.] . . .

identically as set forth in Section 1 of Article IX of the memorandum of January 24. Section 2 of this Article 9 in the over-the-road agreement executed on March 9 is identical to Section 2 of the memorandum of January 24. These same clauses appear in Article 11 in the Southern Conference Local Freight and Forwarding, Pickup and Delivery Agreement for the period covering February 1, 1961, to January 31, 1964. Section 4 of Article IX of the memorandum of January 24 is not in issue here, it having been transferred to another section of the last agreement between the parties and, as I understand the situation, from statements made by counsel at hearing and in brief, the only issue here is in connection with Article IX as set forth in the January 24 memorandum, repeated in the March 9 contracts.

Brown, the Charging Party, was a party to the local freight agreement which expired on January 31. It was requested by the president of Local 728 to execute an-

other contract on or about January 25, which the president of Brown refused to do. At midnight on January 31, picket lines were thrown at Brown's terminal in Atlanta. Brown, a common carrier by motortruck, maintains its principal office and place of doing business in Waynesboro, Georgia, and operates terminals in Savannah, Macon, Augusta, and Athens, Georgia, and at Knoxville, Tennessee, and, until January 31, at Atlanta. Brown was a party to a collective bargaining agreement with the Respondent Local Union No. 728 covering its local pickup and delivery employees at its Atlanta, Macon, and Savannah, Georgia, terminals and with Local Union 621 of the Teamsters covering its pickup and delivery employees at Knoxville. The agreement with Local No. 728, which ran from February 1, 1958, and which was terminated by the refusal of President Brown of Brown to renew or substitute a new agreement therefor, expired on January 31, whereupon Brown closed its Atlanta terminal and contracted out its pickup and delivery work in Atlanta to a private cartage concern, Hudson Hauling Company. The strike against Brown and picketing commenced after-midnight on January 31 and continued until approximately February 13, when picketing commenced at the premises of Hudson Hauling Company. Thereafter, as more fully set forth below, Brown experienced difficulty in handling goods consigned to or through it and says that the proof here shows that the carriers, parties to the January 24 memorandum of agreement, then began refusing to process, check, transport or otherwise handle Brown's freight when it appeared at the terminals of these various motor carriers for interchange or interlining.

The more essential facts regarding the direct dispute between Local 728 and Brown will be discussed below.

It is said on behalf of the Charging Party that the direct result of the refusal of certain of the motor carriers

named as parties to the contract, through their dock or terminal employees and over-the-road drivers to handle or transport Brown's freight, was that these several motor carriers with whom Brown normally did business almost completely ceased to handle or transport Brown's freight. The testimony, practically uncontradicted as discussed below, shows that some carriers did attempt to handle Brown's freight in a different manner than usual and that as a result the customers of Brown did not receive freight from Brown or forward freight to Brown for interchange or interlining.

With this contention in mind, and also the provisions of Article IX of the memorandum of January 24, confirmed in the agreement of March 9, it seems convenient at this point to state the issues as seen by the General Counsel, the Charging Party, the Respondents, and the carriers:

(a) The General Counsel says that it should be decided at the very beginning whether the determination of an alleged violation of Section 8 (e) is made on a *per se* basis, or whether it is necessary to prove the effects of the contract before a determination can be made. He states that his position is that the determination should be made on the *per se* basis. He states quite simply that the issue to be resolved is whether the "Protection of Rights" clauses contained in the several contracts entered into between the Respondent labor organizations and the named motor carriers are a violation of Section 8 (e).

(b) Brown, the Charging Party, says that the mere entering into of the contracts which were agreed upon and executed on January 24 was a violation of the Act *per se* because those motor carriers, parties to the contract, in agreeing to Section IX (which, it says, permits their employees to refuse with impunity to handle the goods, freight and products of other primary employees) did in

effect agree to a provision which would require them (the parties to the contract) to cease doing business with other employees within the meaning of Section 8 (e) of the Act. The Charging Party states the issues involved herein to be:

(1) Whether or not the Memoranda of Agreement and specifically Articles IX and X respectively thereof, entered into on January 24, 1961, between the Respondent Unions in this case and the various motor carriers named as Parties to the Contract, are, under the provisions of Section 8 (e) of the Act, and in the light of the Congressional intent, legislative history, and prior decisional case law involving Section 8 (b) (4), in violation of Section 8 (e) of the Act without regard to effect or implementation?

(2) Whether or not, without regard to legality of the contract at its inception and execution, it was and is unlawful in the light of the evidence demonstrating the effect of the agreement upon certain of the motor carriers who were parties to it?

(3) Whether or not there was an actual legal and binding amendment to the contracts as executed on January 24, which occurred on March 9, 1961, and if there was such an amendment, whether or not the contracts as amended are in violation of Section 8 (e) of the Act, per se?

(4) If the contracts were in fact amended on March 9, 1961, are the amended contracts and the enforcement of same under the evidence adduced at the Hearing a violation of Section 8 (e) of the Act?

(c) The Respondent labor organizations state the questions involved to be these:

I. Whether Section 8 (e), on its Face, and as Applied to the Respondents, Denies Due Process of Law Guaranteed by the Fifth Amendment to the Constitution.

II. Whether Respondents have Entered into an Express Contract or Agreement Proscribed by Section 8 (e) of the Act.

III. Whether Respondents have Entered into an Implied Contract or Agreement in Violation of Section 8 (e).

(d) Counsel for Akers Motor Lines, Atlanta Motor Lines, Central Truck Lines, Dance Freight Lines, Gordons Transports, Inc., Johnson Motor Lines, Miller Motor Express, Murdock Freight Line, Ryder Truck Lines, Inc., Ryder Truck Lines, Inc. of Tennessee, and Wilson Truck Company, state the issues to be:

A. Whether the specified provisions of the said collective bargaining agreement (hereinafter set forth) are per se violative of Section 8 (e) of the National Labor Relations Act, as amended.

B. Whether, in view of the evidence in the Record as to the effect of the said provisions of said collective bargaining agreement, the same are violative of Section 8 (e) of the Act.

(e) Huber & Huber Motor Express, R. C. Motor Lines, and Terminal Transport Company by implication in the record and in brief adopt the issues set forth by the other motor carriers in their briefs.

Counsel for the General Counsel at the outset of the hearing herein, in response to a question from the Trial Examiner, stated that the General Counsel proposed to stand on the proposition that the mere "entering into" of the memorandum of January 24 and the contract of March 9 constituted a violation on the part of each of the parties thereto of Section 8 (e). The Trial Examiner said that he was not quite satisfied, particularly in view of the language of the Supreme Court of the United States in *Local 357 v. N. L. R. B.*, 47 LRRM 2906 (April

17, 1961); and *N. L. R. B. v. News Syndicate Company et al.*, 47 LRRM 2916, 2918, decided that day. See p. 14, below.

The Essential Facts and Effects of the Dispute Between Local Union No. 728 and the Southern Conference on the one side and Brown on the other.

Flowing out of the refusal or failure or choice of Brown not to accept the provisions of the January 21 memoranda of agreement, and the picketing of Brown on February 1, after the expiration of the prior agreements between it and the unions, certain events concerning the breakdown of customary interlining or interchanging of freight between Brown and other common carriers by motor vehicle occurred.

Shortly after the opening of the hearing, I expressed doubt concerning the validity of the position taken by the General Counsel and the Charging Party that **only** "for any labor organization and an employer to enter into any agreement, express or implied . . ." does in itself constitute a *per se* violation of Section 8 (e). Over objection, I received evidence of the following circumstances in connection with the strike against Brown after the expiration or termination of its agreements with the unions. I received evidence from the General Counsel, from the Charging Party, and from the Respondent Unions going to show the effects of the strike against Brown as it affected the business of each of the parties to the contract, as it affected Brown, and as it affected the customers of the named parties to the contract and the impact of the strike against Brown as to Brown's customers and the thrust displayed under Article 9 of the agreement, to which Brown refused to subscribe.

After receiving such testimony I took testimony up to a certain point on behalf of the Respondent Unions going

to show that certain of the carriers were in no respect affected as the result of the dispute or disagreement between Brown and the Respondents.

Consequently, as I write this report, I am in a position where in effect I have told counsel for the General Counsel, at the hearing, that I do not subscribe to his *per se* theory as stated, have permitted the introduction of evidence going to show the effect of the writing of Article 9 and at the same time have permitted counsel for the Respondents to introduce a limited amount of evidence going to show that some carriers were not affected in the least by the strike against Brown.

The affirmative evidence which I admitted showing the effect of the strike against Brown is summarized as follows:

1. Atlanta-New Orleans Motor Freight maintains a terminal in Atlanta. For the first few days after picketing began at Brown on February 1, freight was dispatched to the terminal of Atlanta-New Orleans on several different occasions, none of the freight was unloaded at Atlanta-New Orleans, and was returned to the terminal of Hudson Hauling Company (who had taken over the local pickup and delivery service of Brown). Trailer loads of freight were left on the yard of Atlanta-New Orleans, none of it was moved; a driver for Hudson Hauling eventually was sent to Atlanta-New Orleans to pick it up and return it to the Hudson terminal. Regular dock employees of Atlanta-New Orleans, after freight had been dispatched to its terminal in Atlanta by Brown was handled in regular course; however, an occasion arose when the Hudson Hauling driver arrived when the regular dock employees refused to check or handle Brown freight, the driver was told that the dock foreman would check his freight; the driver stayed there for several hours and during that time called Hudson Hauling Company, his employer, for in-

structions and was told each time to wait. Atlanta-New Orleans through its foreman did not either check the freight or allow Hudson Hauling through its driver to unload on the Atlanta-New Orleans dock. The driver, upon request of the foreman to move his truck away from the dock, did so—the trailer became detached from the truck and fell on the ground as a result of some unknown person having pulled the pin which attaches the trailer to the tractor. After several hours the trailer was picked up, reattached to the tractor and returned to the terminal of Hudson Hauling Company. The freight on that truck never was unloaded. According to Claude Brown, president of Brown, during the first several days after February 1, freight was dispatched to the terminal of Atlanta-New Orleans Motor Freight several times, but none of that freight was unloaded at Atlanta-New Orleans but was returned to the terminal of Hudson Hauling Company. Eventually several full trailer loads left on the yard at Atlanta-New Orleans were picked up and returned to the Hudson Hauling Company terminal. According to President Brown, Sid Johnson, president of Atlanta-New Orleans, was told by Johnson that Atlanta-New Orleans would not accept any Brown freight. On February 7 Brown was notified by telegram from Atlanta-New Orleans and from Atlanta-Asheville Express that the interlining agreements which had been in effect between them were cancelled.

2. Mason & Dixon Lines was delivered a load of freight by Brown after a picket line was set up by Local No. 728 at Brown on February 1, and was checked by a member of the Union. There were at least four other union employees and eight supervisors and office employees present who were not asked to handle the freight. That shipment was loaded outbound by supervisors. Thereafter the supervisors handled the freight.

On February 15, 1961, two union over-the-road drivers were asked to pull loads of Brown freight and they re-

fused. Upon their refusal, no other over-the-road drivers or personnel of any sort were called to pull the Brown loads. These were the only drivers ever asked to pull Brown freight. Supervisors later moved these loads. Because there had been difficulty in handling these two loads, Mason & Dixon imposed an embargo on all Brown freight.

The Mason and Dixon Lines, Inc.
Kingsport, Tennessee

Embargo Notice No. 92

To: All Concerned February 16, 1961

Effectively immediately, an embargo is hereby placed on all traffic moving via or in connection with Brown Transport Corporation.

This embargo is made necessary by labor difficulties being experienced.

In the Atlanta terminal there were 72 city drivers and checkers, three of whom were shown to have refused to handle Brown freight, 15 percent unassigned employees, five foremen, two dispatchers, one warehouse superintendent, an assistant terminal manager and a terminal manager. There were twelve over-the-road drivers domiciled in Atlanta and 200 in the system. Casual and extra employees were available. The company operates a central dispatch board to send drivers when needed to various terminals in the area served by the company. There was no effort made to hire drivers through central dispatch nor to interrogate over-the-road drivers outside Atlanta as to whether they would handle freight.

3. Ryder Truck Lines employed in Atlanta 12 supervisors, 90 to 100 dock workers, some 100 city drivers and 137 road drivers domiciled in Atlanta. The company operates an extra board which supplies men for 40-50 percent of the over-the-road operations. Casual help customarily was used on pick-up and delivery but no effort was made to have them move Brown freight. Only a

few of the union men were asked explicitly to handle Brown freight.

Brown freight came across the Ryder dock daily. After February 1, it was all moved by supervisors. Much of the freight was moved by piggy-back (railroad flat car or box car). Railroad piggy-back operations are limited to railroad terminal facilities which must necessarily include ramps on which vans can be hauled for loading on the railroad car. On occasion the railroad sent its employees to the Ryder dock to pick up freight by truck.

On only one occasion did the carrier fail to move Brown freight. That load was destined for Vero Beach, Florida and Miami, Florida. Piggy-back was available from Atlanta to Jacksonville, Florida. Ryder had the facilities to drive from Jacksonville to Vero Beach and on to Miami but on this occasion did not attempt to do so nor to find out if its Jacksonville drivers would pull the freight. No inquiry was made into the labor situation in Jacksonville. Previous to February 1 the company sometimes refused freight it was not equipped to handle.

4. Wilson Truck Company employed in Atlanta some 154 city drivers, checkers, and dockmen and some 14 or more over-the-road drivers. There were two foremen and a dispatcher on each shift during the period involved. There was a central dispatch office in Nashville; however, the Atlanta terminal did not ask it for drivers from elsewhere in the system. After February 1, some of the regular employees were asked to handle Brown freight. On at least two occasions drivers who refused to pull trucks of Brown freight helped unload them after supervisors drove them to the consignee. At least one driver pulled a Brown load over the road.

Wilson moved Brown freight by regular employees, supervisory personnel, piggy-back by railroad, railroad shipments of less than carload lots.

5. Hoover Motor Express' Atlanta terminal employed 30 checkers and dockmen, 25 city drivers and nine road drivers domiciled in Atlanta. There was one supervisor per shift, and 200 road drivers in the system. There is a central dispatch office in Nashville, which normally is called upon when extra drivers are needed. The carrier uses casual drivers, usually on Saturday and Sunday, holding no union seniority rights.

Only a few regular employees were asked to handle Brown freight. It was handled by supervisors for a week after which one or two loads were handled by an independent contractor. When that independent contractor was unable to take another load, Hoover returned it to Brown and thereafter received no more freight from Brown. Central dispatch was not asked for drivers nor did this carrier attempt to get casuals to handle the Brown freight, nor were unassigned men called upon to handle it. The General Counsel's witness admitted that the supervisors could have handled all the Brown freight ready to be moved on the dock.

6. Central Truck Lines in its Atlanta terminal had some 70 checkers and loaders and 35 city drivers. Thirty road drivers were domiciled in Atlanta. Three to five supervisors were on each of the three shifts. There were 200 road drivers in the system. Casual employees were used almost daily. Casuals sometimes come in to the dock looking for work; the company maintained a list of 30 to 40 casual employees available for reaching by telephone.

With the exception of the first load delivered after February 1 Central handled all Brown freight tendered it although occasionally Brown trucks left without pulling up to the dock or contacting a foreman. The freight was handled by regular over-the-road drivers for 2 weeks and thereafter was handled by having Brown load a Central truck and having a Central driver pull it. Central also used at least two different independent contractors for

over-the-road hauls, using equipment belonging to an independent contractor. Other loads were pulled by loading Central trailers at Hudson Hauling Company and taking them over the road without returning to the Central dock. Central employed casual and extra labor.

Central did not use piggy-back, though it was available, nor did it ask for drivers through central dispatch. This carrier previously had used both piggy-back and spot leases.

7. Gordons Transports, Inc., in Atlanta has 29 city drivers and 3 checkers and hostlers. There are 200 road drivers in the system. Drivers occasionally check freight.

Although Gordons does very little business with Brown, during the time in question Gordons refused to accept any Brown freight. Only four men had refused to handle Brown freight. The General Counsel's witness admitted that at least one shipment refused was so small that he could have checked it himself.

The record here contains testimony concerning the effect of the dispute between the Respondents and Brown as to other carriers.[2]

Enough has been set forth above, it seems to me, to indicate substantial fact regarding the interference of normal operations of carriers as a result of this dispute.

Counsel for the General Counsel has quite carefully set forth the position of his office in his brief, and has been joined by counsel for the Charging Party. It is said in brief, that:

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[2] Pike Transfer Company, Transcon Lines, Inc., Johnson Freight Lines Company, Jack Cole Company, Northern Freight Lines, McLean Trucking Company, Hennis Freight Lines, Inc. I refused to receive proof offered by the Respondents that other carriers moved and handled freight to or from Brown through the usual complement of help of such carriers, supervisors, by railroad, spot leases, and other means or methods of operation.

It should be decided at the outset whether the determination of an alleged violation of Section 8 (e) is to be made on a per se basis, that is, on an interpretation of the contract alone, or whether it is necessary to prove the effects of the contract before a determination can be made. It is the General Counsel's position that the determination should be made on the per se basis. To do otherwise would be inconsistent with the statutory language and the legislative intent, which will be discussed hereinafter, and would result in an incongruous situation. Section 8 (e) is clear and unambiguous; it proscribes the *entering into* of a certain type of contract. Senator Goldwater after paraphrasing Section 8 (e) in his analysis of the Labor-Management Reporting and Disclosure Act, stated:

> This means that such contractual clauses are per se illegal. It is unlawful for either party even to execute such an agreement . . . (Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, Vol. II, p. 1857, hereinafter cited as "II L. H.").

The incongruous situation would arise in relation to Section 8 (b) (4) (A) of the Act. This section proscribes a labor organization from engaging in certain primary or secondary activity where an object thereof is to force or require an employer "to enter into any agreement which is prohibited by section 8 (e)." Thus, it must be determined whether the agreement is prohibited by Section 8 (e) before it can be determined whether Section 8 (b) (4) (A) has been violated. Since Section 8 (b) (4) (A) involves the forcing or requiring of an employer to enter into such an agreement, and not the actual entering into of the agreement, there can be no resultant contractual effects. Therefore, a determination of the lawfulness of an agreement under Section

8 (e) in an 8 (b) (4) (A) proceeding must necessarily be made on the per se basis. [Citing] *Amalgamated Lithographers of America, et al.*, 130 NLRB No. 102; *Amalgamated Lithographers of America, et al.*, 130 NLRB No. 107; and *Highway Truck Drivers and Helpers, Local 107, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Independent* (E. A. Gallagher & Sons), 131 NLRB No. 117. It should follow that a determination of an agreement in a Section 8 (e) proceeding must also be on the same basis. Otherwise, there will be a double standard of proof for two interrelated sections involving the same type agreement. This could very well result in the situation where the same agreement before its execution would be per se violative of Section 8 (e) in an 8 (b) (4) (A) proceeding, but after its execution would not be violative of Section 8 (e) without the showing of its effects. Naturally, if there is no labor dispute, there is no need to invoke the agreement, and, consequently, there would be no effects. If this were the situation, and if the effects of an agreement must be proved before there can be a violation of Section 8 (e), parties would then be required to await the cessation of business before securing a remedy. This would be in complete contravention of the purpose and policy of the Act as set forth in Section 1 of the Act. The purpose of the Act is to promote the flow of commerce by avoiding industrial strife, and certainly not to await the occurrence of such strife. The "per se" method of determination of Section 8 (e) proceedings would effectuate this purpose. Reference is made to *Genuine Parts Company*, 119 NLRB 399, to which this same Local 728 here was a party there.

I do not agree for the reasons set forth herein.

The positions of the parties as set forth at the hearing and in briefs, are equally persuasive. The General Coun-

sel and counsel for the Charging Party view the amendment to the Act as set forth in Section 8 (e)[3] to mean that the mere "entering into of an agreement" between a labor organization and employer, whether "express or implied," itself is in contravention of this part of the Act and (as here) the labor organization as a party thereto, by entering into and signing such an agreement made in writing with the employer, has engaged in an unfair labor practice. The Respondent labor organizations take the opposite view.

I had occasion to consider the meaning and intent of the Congress, in relation to Section 8 (e) in *Mary Feifer, d/b/a American Feed Co.* (Case No. 2-CE-4, I. R. No. 691, issued May 16, 1961, not yet decided by the Board after the filing of exceptions), in which I stated my reasons for the discard by me of the *per se* argument made then,

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[3] Section 8 (e) reads as follows:

It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: Provided, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further,* That for the purposes of this subsection (e) and section 8 (b) (4) (B) the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further,* That nothing in this Act shall prohibit the enforcement of any agreement which is within the foregoing exception.

and now here, by the General Counsel. I think there must be something more than an express or an implied agreement between a labor organization and an employer —something to show an actual violation of Section 8 (e) before impact occurs. I rely on *N. L. R. B. v. News Syndicate Company, Inc.*, 81 S. Ct. 849, decided April 17, 1961, and the two companion cases mentioned there: *International Typographical Union* [*etc.*] *v. N. L. R. B.*, 81 S. Ct. 835, and *Local 357* [*etc.*] *v. N. L. R. B.*, 81 S. Ct. 835. Further, under the doctrine of *stare decisis*, I think that *Sand Door and Plywood Co. v. N. L. R. B.*, 357 M. S. 93, as discussed by me in my report in *American Feed Co.*, mentioned above, is here applicable in an effort to determine the true meaning of Section 8 (e).

Incident to the resolution of the problems, as severally set forth by the parties in their definitions of the issues as seen by them, noted above (p. 7) are the constitutional questions raised by Local 728 and the Southern Conference. Counsel for these Respondents rightly say that neither I nor the Board should review or will attack the validity of Section 8 (e). These questions are within the province of a constitutional court.

Counsel for the Respondent Unions, at hearing and in brief, have clearly stated what they believe to be the proper construction of the language of the Act here to be construed. The terms "contract or agreement" . . . "express or implied" . . . "ceases or refrains" . . . "handling [etc.] any of the products of any other employer" . . . "to cease doing business with any other person" . . . and the distinction between primary and secondary boycott have surely been brought to my attention by them, and have been considered.

The several counsel for the Parties to the Contract have stated their respective positions, I believe, in full. As I understand them, they contend, in effect, that they have dealt with the Respondents in all good faith.

Concluding Findings.

Having disregarded the *per se* theory of the General Counsel and the Charging Party, I now go to the question of whether or not Section 8(e), under the circumstances shown by testimony herein, has been shown to have been, or now is, being violated.

I specifically find an express (not an implied) contract made between the Respondent Unions and the Parties, that is the carriers, named as Parties to the Contract, and I further find that as a result of the refusal of Brown Transport Corp. to enter into the renewed agreement to be effective February 1, 1961, normal operations of carriers, as to both over-the-road and local pickup operations were disrupted, and that the whole result was through the attempted evasion of Section 8(e) by the Respondent Unions.

The General Counsel has suggested that a recommended order be issued herein requiring the Respondent Unions to cease and desist from (1) entering into any contract or agreement, express or implied, with the several motor carriers parties hereto, or with any other employer, whereby such employers agree not to handle the goods or freight of any other employer or to cease doing business with any other person, and (2) maintaining in effect, implementing, or renewing the "protection of rights" clauses contained in the two memoranda of agreement entered into on January 24 and in the two modified contracts entered into on March 9, 1961. I cannot go that far.

I think here the General Counsel has made out a *prima facie* case of violation of Section 8(e), in that normal transportation or handling or use of goods in interstate commerce was, by the action of the Respondent Local 728, delayed, or resulted in, deviation from the usual flow of commerce between States as customarily and usually per-

formed by motor vehicle (common carriers) to resultant interruption of the free flow of traffic in commerce. I so find.

IV. The effect of the unfair labor practices upon commerce.

The activities of the Respondent Union Local No. 728 and the Southern Conference, as set forth above,[4] occurring in connection with the operation of Brown Transport Corp. and the freight carriers in and around and operating in the Atlanta, Georgia, area, who employ members of the Respondent Union Local No. 728, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

V. The remedy.

Having found that the Respondent Unions have violated Section 8 (e), as set forth above, I shall recommend an order requiring that they cease and desist from the enforcement by affirmative act of the current agreement or any like agreement or contract as shown by prior conduct, and also recommend that they take certain affirmative action designed to effectuate the policies of the Act. The wide impact of the Unions' unlawful activities, found herein, make it incumbent upon me to recommend the issue of a broad order so as to enjoin the recurrence, throughout the Atlanta, Georgia, area, of the conduct found to be unlawful as stated by me above. It would be appropriate, I think, to incorporate in an order, a provision that the Respondent Unions

[4] At hearing motion was made on the part of the Southern Conference of Teamsters, to be separated from this case. I now decide that the Southern Conference as a party to the contract, is as much involved here as a party as the Respondent Local Union 728.

furnish a copy of the notice attached to this Intermediate Report as an Appendix, to each of the offices of the parties named as parties to the contract in the complaint in this case, and to the Charging Party, to post at their respective offices and places of business if they so elect to do.

Conclusions of Law.

1. Truck Drivers & Helpers Local Union No. 728, and the Southern Conference of Teamsters, both affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Ind., are labor organizations within the meaning of Section 2 (5) of the Act.

2. By engaging in and by inducing and encouraging many employees of companies engaged in the carrying of freight in the Atlanta, Georgia, area, members of the Respondent Local Union, to engage in a refusal in the course of their employment to handle freight brought to docks of their respective employers from or by Brown Transport Corp., at Brown's Atlanta, Georgia, terminal and the consequent interruption of the flow of interstate commerce through the 35 parties to the contract with the Teamsters unions named in the complaint, the Respondent Unions, Local 728 and the Southern Conference, have engaged in and are now engaging in unfair labor practices within the meaning of Section 8 (e) of the Act.

3. The unfair labor practices found above are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act, and are in contravention of Section 8 (e).

Recommended Order.

On the basis of the foregoing findings of fact and conclusions of law, I recommend to the Board that it issue an order requiring the Respondents

A. To cease and desist from:

1. Entering into any contract or agreement, express or implied, with the several motor carriers named herein as parties to the contract, wherein such employer may agree not to handle the goods or freight of any other employer or to cease doing business with any other person; and

2. Maintaining in effect, implementing or renewing the "Protection Rights" clauses contained in the two memoranda of agreement entered into on January 24, 1961, and in the two modified contracts entered into March 9, 1961.

B. Take the following affirmative action, which I find will effectuate the policies of the Act:

1. Post and distribute the notice as set forth in Section V of this Intermediate Report entitled "The remedy."

2. Notify the Regional Director for the Tenth Region, in writing, within 20 days of the service upon them, what steps have been taken by each of them to comply with this recommended order.

It is further recommended that, unless the Respondent shall within the prescribed period notify the said Regional Director that it will comply with the foregoing recommendations, the National Labor Relations Board issue its order requiring the Respondent to take the aforesaid action.

Dated at Washington, D. C.

Arthur E. Reyman,
Arthur E. Reyman,
Trial Examiner.

Appendix.

Notice to All Employees.

Pursuant to

The Recommendations of a Trial Examiner

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our members that:

We Will Not engage in, or encourage employees of Brown Transport Corp., Akers Motor Lines, or any other freight carrier employer in the Atlanta, Georgia, area employing members of our union to engage in, a strike or concerted refusal to the course of their employment to process, transport, or otherwise handle or work on goods, articles, or commodities or to perform services for their respective employers where an object thereof is to force or require any such employer to cease doing business with Brown Transport Corp., or with any like person or company who has business relations with aforementioned freight carriers in the Atlanta area.

Truck Drivers & Helpers Local Union No. 728, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America.
(Labor Organization.)

Dated ..... By .....
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

APPENDIX D.

United States Court of Appeals
For the District of Columbia Circuit.

September Term, 1963.

No. 17,662

Truck Drivers Union Local No. 413, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, et al.,
Petitioners,

v.

National Labor Relations Board,
Respondent.

No. 17,663

Truck Drivers & Helpers Local Union No. 728, International Brotherhood of Teamsters, et al.,
Petitioners,

v.

National Labor Relations Board,
Respondent,

Watson-Wilson Transportation System, Inc., et al.,
Intervenors.

On Petitions to Review and Set Aside, and on Cross-Petitions to Enforce, Orders of the National Labor Relations Board.

Before: Bazelon, Chief Judge, and Bastian and Wright, Circuit Judges.

Judgment.

These cases came on to be heard on the record from the National Labor Relations Board and on petitions to

review and set aside, and cross-petitions for enforcement of orders of the National Labor Relations Board, and were argued by counsel.

On Consideration Whereof, it is ordered and adjudged by this court that the orders of the National Labor Relations Board on review in these cases are set aside in part and enforced in part, and these cases are hereby remanded to the said National Labor Relations Board.

Pursuant to Rule 38 (1) the respondent shall within 10 days hereof serve and file a proposed enforcement decree consistent with the opinion of this court.

Per Circuit Judge Wright.

Dated: April 9, 1964.

APPENDIX E.

Supreme Court of the United States.

No. ....., October Term, 1964.

Truck Drivers Union Local No. 413, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, et al.,
Petitioners,

vs.

National Labor Relations Board.

Order Extending Time to File Petition for Writ of Certiorari.

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 6th, 1964.

/s/ Earl Warren,
Chief Justice of the United States.

Dated this 30th day of June, 1964.

APPENDIX F.

Section 8 (e) of the Labor Management Relations Act of 1947 provides:

"It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: *Provided*, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further*, That for the purposes of this subsection and subsection (b) (4) (B) of this section the terms 'any employer', 'any person engaged in commerce or an industry affecting commerce,' and 'any person' when used in relation to the terms 'any other producer, processor, or manufacturer,' 'any other employer,' or 'any other person' shall not include persons in the relation of a jobber, manufacturer, contractors, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further*, That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception."

APPENDIX G.

The Fifth Amendment to the United States Constitution provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life—liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 453

TRUCK DRIVERS UNION LOCAL NO. 413, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 19–36) is reported at 334 F. 2d 539. The Board's decisions and orders (Pet. 37–140) are reported at 140 NLRB 1436 and 140 NLRB 1474.

JURISDICTION

The judgment of the court of appeals (Pet. 141–142) was entered on April 9, 1964. On June 30, 1964, Mr. Chief Justice Warren extended the time

for filing a petition for a writ of certiorari to and including September 6, 1964 (Pet. 143). The petition was filed on September 3, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Section 8(e) of the National Labor Relations Act, as amended in 1959, makes it an unfair labor practice for an employer and a labor organization to enter into an agreement "express or implied," whereby the employer agrees to "cease or refrain from handling * * * or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person" (a so-called "hot cargo" agreement). The questions presented are:

1. Whether contract clauses in which an employer relinquishes his right to discharge or discipline employees who refuse to handle "struck goods" or refuse to cross a picket line at a secondary employer's premises violate Section 8(e).

2. Whether Section 8(e) is arbitrary, in violation of the due process clause of the Fifth Amendment to the Constitution, because it exempts certain specified industries, and not others, from its terms.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are set forth at p. 144 of the petition.

STATEMENT

In March 1961, petitioner labor organizations—two locals of the International Brotherhood of Teamsters and its Central States Drivers Council and Southern Conference—entered into collective bargaining agreements with numerous employers engaged in the interstate transportation of freight by motor vehicle (R. I, 239–240; R. II, 391–393).[2] The agreements contained an article entitled "Protection of Rights," which was divided into two sections. Section 1, captioned "Picket Line," provided (R. I, 68–69; Pet. 40):[3]

> It shall not be a violation of this Agreement and it shall not be cause for discharge or disciplinary action in the event an employee refuses to enter upon any property involved in a labor dispute or refuses to go through or work behind any picket line, including the picket line of Unions party to this Agreement and including picket lines at the Employer's place or places of business.

Section 2, captioned "Struck Goods," provided in relevant part (R. I 69–70; Pet. 49, 51–52):

> Recognizing that many individual employees covered by this contract may have personal convictions against aiding the adversary of other

---

[2] Two separate cases—Nos. 17,662 and 17,663—were consolidated in the court of appeals. "R. I" refers to the joint appendix in No. 17,662, and "R. II," to the joint appendix in No. 17,663.

[3] There are minor wording variations in the clauses of the various agreements. The language of the Central States Local Cartage Agreement is set forth herein.

workers, and recognizing the propriety of individual determination by an individual workman as to whether he shall perform work, labor or service which he deems contrary to his best interests, the parties recognize and agree that:

* * * * *

[b] Likewise, it shall not be a violation of this Agreement and it shall not be a cause for discharge or disciplinary action if any employee refuses to handle any goods or equipment transported, interchanged, handled or used by any carrier or other person, whether a party to this Agreement or not, at any of whose terminals or places of business where there is a controversy between such carrier, or person, or its employees on the one hand and a Labor Union on the other hand; and such rights may be exercised where such goods or equipment are being transported, handled or used by the originating, interchanging or succeeding carriers or persons, whether parties to this Agreement or not.

[c] The Employer agrees that it will not cease or refrain from handling, using, transporting, or otherwise dealing in any of the products of any other employer or cease doing business with any other person, or fail in any obligation imposed by the Motor Carriers' Act or other applicable law, as a result of individual employees exercising their rights under this Agreement or under law, but the Employer shall, notwithstanding any other provision in this Agreement, when necessary, handle, use, transport, or otherwise deal in such products and continue doing such business by use of other employees

(including management representatives), other carriers, or by any other method it deems appropriate or proper.

The General Counsel of the Board issued a complaint charging that the execution of the foregoing collective bargaining agreements constituted an unfair labor practice because the agreements were "hot cargo" contracts which are illegal under Section 8(e) of the Act (Pet. 60–61). The Board held that the "Picket Line" provision violated Section 8(e) because, by depriving the contracting employer (a neutral) of the right to discharge and replace employees who refused to cross a secondary picket line at his own premises or a picket line at the premises of another employer, the provision in effect committed the contracting employer to cease doing business with other employers who may be disfavored by the union (Pet. 39–49).[3] The Board further held that the above clauses of the "Struck Goods" provision also violated Section 8(e). It ruled that, by precluding the con-

[3] However, the Board added that a picket line clause which sanctioned refusals to cross a picket line at the premises of another employer would not be unlawful if it were limited to a situation where the employees of that employer were engaged in a strike ratified or approved by their duly authorized representative. The Board so concluded because, in its view, the picket line proviso to Section 8(b)(4)—which provides that "nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act"—qualified Section 8(e) no less than the companion Section 8(b)(4)(B). (Pet. 43–48.)

tracting employer from using his regular employees to handle the goods of persons disfavored by the union, these clauses amounted to an agreement by the contracting employer to cease doing business with such disfavored persons (Pet. 51–54, 104–105).[4]

The Board ordered the petitioner unions to cease and desist from maintaining or enforcing the contract clauses found to be illegal, or any other agreement violating Section 8(e), and to post appropriate notices (Pet. 55–58, 107–110).

The court of appeals agreed with the Board that the "Struck Work" clause violated Section 8(e). (Pet. 30–31.) It also agreed that the "Picket Line" provision violated that section insofar as it would protect employees against discharge for refusing to cross a secondary picket line. The court concluded, however, that, insofar as the clause applied to refusals to cross a primary picket line at another employer's premises, it was directed against "primary" activity and thus was valid because it was outside the purview of Section 8(e). The court, accordingly, modified the Board's order with respect to the "Picket Line" provision. (Pet. 21–27, 35–36.)[5]

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[4] The Board further found that certain other provisions of the contracts—the "ally," "subcontracting," and "hazardous work" clauses—also violated Section 8(e) (Pet. 49–51, 54–55, 198). The court of appeals sustained the Board on the "ally clause," rejected its finding on the "subcontracting clause," and remanded for further proceedings respecting the "hazardous work clause" (Pet. 29–30, 32–34). The petition raises no question respecting the court's disposition of these clauses.

[5] The Board has decided not to seek certiorari with respect to the portions of the court's decision adverse to it.

ARGUMENT

1. The court of appeals correctly upheld the Board's conclusion that the "Struck Goods" provision, under which the contracting employer agreed not to discharge or discipline his employees if they refused to handle any goods coming from a person engaged in a labor dispute, violated Section 8(e) of the Act.

Section 8(e) prohibits any agreement "express or implied" whereby an employer undertakes "to cease or refrain from handling * * * the products of any other employer, or to cease doing business with any other person." As the court below pointed out in *Los Angeles Mailers Union No. 9* v. *National Labor Relations Board*, 311 F. 2d 121 (C.A.D.C.), involving a similar provision, since "the employer functions through his employees," when "he enters into an agreement with their representative that they are not to handle the products referred to, the agreement as a practical matter must be held to contemplate that the employer is not to do so" (p. 124). In other words, if the employer is precluded from discharging employees who refuse to handle goods of certain other employers, the practical effect is to force him not to deal with those employers, since he could deal with them to the same extent as before only by incurring the added expense and inconvenience of hiring additional employees to handle their products. See, also, *Employing Lithographers of Greater Miami* v. *National Labor Relations Board*, 301 F. 2d 20, 29-30 (C.A. 5) ("Trade Shop" and "Refusal to Handle" clauses) and *National Labor*

Relations Board v. *Amalgamated Lithographers of America*, 339 F. 2d 31, 41–42 (C.A. 9), certiorari denied, 379 U.S. 943 ("Termination" and "Refusal to Handle" clauses), where the courts ruled that similar clauses violated Section 8(e). This conclusion, moreover, is consistent with the legislative history of the section, which shows that Congress intended to enact a broad and comprehensive ban against "hot cargo" agreements, and equated "'employee-rights' clauses with other hot cargo clauses" (Pet. 31). See the history cited by the court below, Pet. 21; and note the clauses in *Local 1976, Carpenters* v. *National Labor Relations Board*, 357 U.S. 93, 95, 97.

There is no substance to petitioners' contention (Pet. 11–12) that the "Struck Goods" provision is primary and outside the purview of Section 8(e) because its basic purpose was merely to protect employees of the contracting employer who might have personal convictions against handling goods and equipment coming from employers involved in labor disputes. Even assuming that this was an object of the clause, such attempts to protect these "individual rights" must comply with the statute. Although individual employees may have a right to decide for themselves not to handle certain goods, their employer has the correlative right to replace them with other employees who will handle the goods. The "Struck Goods" clause, by depriving the employer of this choice, goes beyond protection of the rights of the individual employees and compels the contracting employer to cease doing business with employers disfavored by the union. It is the policy of Section

8(e) to prohibit contractual arrangements between the union and the employer that commit the latter to such a response whenever the persons with whom it does business become involved in a labor dispute.

Nor is a different conclusion required because paragraph (c) of the "Struck Goods" clause provided that the contracting employer would continue to deal with the struck employer and, in the event of a refusal by the former's employees to handle the latter's goods, would undertake to handle them by other means (see Pet. 14–15). As the Board pointed out (Pet. 88–89), "no matter what expedient allowed by the 'continued business' clause the carrier used to carry on business with the struck employer, the normal, efficient and profitable operation of his business would be disrupted to that extent. It cannot be assumed that he would long continue to do business with the struck employer under such handicaps."

2. The court of appeals was also correct in concluding that the "Picket Line" provision violated Section 8(e) insofar as it protected employees against discharge for refusing to cross a secondary picket line. Absent a contract provision, an employer, so long as he is motivated by business considerations, is free to replace employees who are unwilling to cross a picket line with those who are willing to do so.* As the Board pointed out (Pet. 43), the "Picket

* See *Redwing Carriers*, 137 NLRB 1545, affirmed *sub nom. Teamsters Local Union No. 79* v. *National Labor Relations Board*, 325 F. 2d 1011 (C.A. D.C.), certiorari denied, 377 U.S. 905; cf. *National Labor Relations Board* v. *Cone Brothers Contracting Co.*, 317 F. 2d 3 (C.A. 5), certiorari denied, 375 U.S. 945.

Line" clause, by "denying to an employer his privilege of replacing employees who refuse to carry out their assigned duties," in effect requires "the employer to agree to cease or to refrain from handling the products of, or otherwise dealing with the employer whose products or services are under the union's ban." Such a clause thus falls within the literal prohibition of Section 8(e). However, Section 8(e), like the companion Section 8(b)(4)(B),[7] must be construed so as not to interdict legitimate primary activity. Since refusals to cross a primary picket line are a normal incident of such activity,[8] the operation of the "Picket Line" clause in connection with a primary picket line may properly be deemed to fall outside the purview of Section 8(e).[9] But, insofar as the "Picket Line" clause would privilege refusals to cross a secondary picket line, it was properly subjected to the prohibition of Section 8(e). As the court below pointed out (Pet. 22): "Refusal

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[7] Section 8(b)(4)(B) makes it unlawful for a labor organization to induce an individual to strike, or to threaten, coerce, or restrain any person, for an object of forcing that person "to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person."

[8] See *National Labor Relations Board* v. *International Rice Milling Co.*, 341 U.S. 665; *United Steelworkers* v. *National Labor Relations Board*, 376 U.S. 492.

[9] The court below rejected the Board's position that a picket line clause, even if limited to a primary picket line, would be "exempt" from Section 8(e) only insofar as it complied with the requirements of the proviso to Section 8(b) (pp. 5, 6, *supra*).

to cross that line would itself be secondary activity. To the extent that the clause would protect such refusal to cross, it would then be authorizing a secondary strike and would *pro tanto* be void under § 8(e) of the Act."

The considerations that petitioners urge (Pet. 15–17) do not justify a different conclusion. Since the effect of the "Picket Line" provision is to compel an employer to cease dealing with other employers with whom the Union has a labor dispute, it is just as immaterial here as it is with respect to the "Struck Goods" provision that the Union may have been seeking only to protect "individual employee" rights. The difficulties that employees may sometimes encounter in ascertaining whether picketing is primary or secondary, and hence in knowing whether refusing to cross the picket line is likely to lead to loss of their jobs, may be encountered in other contexts, and are not sufficiently serious to show that Congress did not intend to prohibit a "Picket Line" clause to the extent here condemned. The fact that secondary activity may be reached under other provisions of the Act does not indicate that Congress did not also intend to deal with it by prohibiting "Picket Line" clauses that sanction secondary pressure. Finally, the cases relied on by petitioner (Pet. 16–17) all involved a refusal to cross a primary picket line, and none involved the validity of a picket line clause.

3. There is no substance to petitioners' contention (Pet. 17) that Section 8(e) violates the Fifth Amendment. The argument is that Congress acted arbitrar-

ily and unreasonably in exempting from the prohibitions of the section only two industries—the garment and the construction industries (Pet. 17). But, as the court below stated (Pet. 24): "Courts today no longer sit in review of the economic wisdom of the distinctions drawn by the legislature, and the failure to grant exemption from § 8(e) to all industries which claim they merit an exemption does not void the Act. In this connection, we note that the unions in the trucking industry were the prime target of congressional concern."[a] The same contention has been rejected by the two other courts of appeals that have considered it. See *Employing Lithographers of Greater Miami* v. *National Labor Relations Board*, 301 F. 2d 20, 24–27 (C.A. 5); *National Labor Relations Board* v. *Amalgamated Lithographers of America*, 309 F. 2d 31, 45 (C.A. 9), certiorari denied, 372 U.S. 943.

[a] The legislative history of Section 8(e) is summarized in Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*, 73 Harv. L. Rev. 1086, 1118.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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OCTOBER 1964.

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